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March 2014 Supplement

to the

2013 Edition

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PREFACE

Use of Rules Supplement; format.

The March 2014 Supplement to the 2013 Edition of the Mississippi Court Rules Annotated is a publication of LexisNexis. It has been edited, annotated and indexed by the staff of the publishers. The Supplement reflects all changes and additions to the Rules, the official Comments and Notes, and the Forms received since the publication of the 2013 Rules Edition; the annotations are reviewed and updated, providing the user with the most current and useful information.

Each set of rules included in this Supplement will be followed by an index if the Supplement contains new rules for the set or if there are amendments to existing rules that necessitate changes in the index appearing in the 2013 Edition.

The material contained in this Supplement will be incorporated into the 2014 Edition of the Mississippi Court Rules Annotated.

Scope of rules and annotations.

This Supplement includes all changes and additions to the Rules, the official Comments and Notes, and the Forms that have taken place since publication of the 2013 Edition up to and including amendments effective December 1, 2013. In addition, notes construing the Rules have been taken from the reports of decisions of the Mississippi Supreme Court and the Court of Appeals and decisions of the appropriate federal courts. These cases will be printed in the following reporters:

Southern Reporter, 3rd Series
United States Supreme Court Reports
Supreme Court Reporter
United States Supreme Court Reports, Lawyers' Edition, 2nd Series
Federal Reporter, 3rd Series
Federal Supplement, 2nd Series
Federal Rules Decisions
Bankruptcy Reporter

Additionally, annotations have been taken from the following sources:

American Law Reports, 6th Series
American Law Reports, Federal Series
Mississippi College Law Review
Mississippi Law Journal

The annotations also include Editor's notes inserted by the publisher's editorial staff to explain references or to call attention to obvious errors, inconsistencies or ambiguities in the Rules, the official Comments and Notes, and the Forms and to provide advance information on proposed new rules. Also, brackets have been editorially inserted around material in the text, when

necessary, to correct misspellings, punctuation or language and incorrect references to the Rules, sections of the Code, titles of positions, or names of institutions.

Amendments, additions, changes, and revisions of rules.

Amendments, additions, changes, and revisions since the 2012 Edition of the Mississippi Court Rules and included in this Supplement are to the following:

Federal Rules of Appellate Procedure

Information, suggestions, comments, and questions.

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MISSISSIPPI RULES OF CIVIL PROCEDURE

CHAPTER II. COMMENCEMENT OF ACTION: SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Rule 3. Commencement of action.

JUDICIAL DECISIONS

Applicability.

Because the Mississippi Structured Settlement Protection Act, Miss. Code Ann. §§ 11-57-1 through 11-57-1-15, requires court approval of a transfer of structured settlement payment rights, a civil action is commenced by filing a complaint with the court; to obtain personal jurisdiction over an interested party, service of process is required consistent with either Miss. R. Civ. P. 4 or 81. RSL Funding, LLC v. Saucier (In re Saucier), — So. 3d —, 2013 Miss. App. LEXIS 133 (Miss. Ct. App. Mar. 26, 2013), writ of certiorari denied by 2014 Miss. LEXIS 71 (Miss. Jan. 30, 2014), writ of certiorari denied by 2014 Miss. LEXIS 74 (Miss. Jan. 30, 2014).

Rule 4. Summons.

JUDICIAL DECISIONS

Applicability.
Dismissal.
Good cause.
Jurisdiction.
Service of process.
Statute of limitations.
Waiver.

Applicability.

Because the Mississippi Structured Settlement Protection Act, Miss. Code Ann. §§ 11-57-1 through 11-57-1-15, requires court approval of a transfer of structured settlement payment rights, a civil action is commenced by filing a complaint with the court; to obtain personal jurisdiction over an interested party, service of process is required consistent with either Miss. R. Civ. P. 4 or 81. RSL Funding, LLC v. Saucier (In re Saucier), — So. 3d —, 2013 Miss. App. LEXIS 133 (Miss. Ct. App. Mar. 26, 2013), writ of certiorari denied by 2014 Miss. LEXIS 71 (Miss. Jan. 30, 2014), writ of certiorari denied by 2014 Miss. LEXIS 74 (Miss. Jan. 30, 2014).

Dismissal.

Trial court did not abuse its discretion by determining that no good cause was shown by a property owner in failing to timely serve process on a county, because the owner made no attempt to obtain an extension of time to serve process on the county under Miss. Code Ann § 11-46-11. Sturdivant v. Moore Bayou Water Ass'n, — So. 3d —, 2013 Miss. App. LEXIS 493 (Miss. Ct. App. Aug. 13, 2013), writ of certiorari denied by 2014 Miss. LEXIS 81 (Miss. Jan. 30, 2014).

As appellant failed to file a motion for extension of time to serve an estate until more than 120 days after filing the complaint, and as the statute of limitations (Miss. Code Ann. § 15-1-49) expired thereafter, the trial court did not abuse its discretion in dismissing his suit against the estate with prejudice. Covington v. McDaniel (In re Estate of Necaise), 126 So. 3d 49 (Miss. Ct. App. 2013), writ of certiorari denied by 125 So. 3d 658, 2013 Miss. LEXIS 598 (Miss. 2013), writ of certiorari denied by 125 So. 3d 658, 2013 Miss. LEXIS 601 (Miss. 2013), writ of certiorari denied by 125 So. 3d 658, 2013 Miss. LEXIS 610 (Miss. 2013).

Good cause.

Insured's claims against her insurer for uninsured motorist benefits was properly

dismissed because she failed to serve the insurer within the 120-day time limit of Miss. R. Civ. P. 4(h); although she filed a motion for enlargement of time, she never obtained a ruling on that motion, and she failed to show good cause for the delay. Edwards v. State Farm Mut. Ins. Co., 117 So. 3d 639 (Miss. Ct. App. 2013).

Ruling that no good cause had existed for a 60-day extension of the time for serving process on a limited liability company (LLC) in a wrongful eviction action was not an abuse of discretion where plaintiffs had previously been granted a 120-day extension, four years had elapsed between that extension and the 60-day extension in which it appeared plaintiffs had not taken any steps toward serving defendants, and while the LLC had failed to update the address of its registered agent, service of process via the Secretary of State had always been available under former Miss. Code Ann. § 78-29-111(2). Yarbrough v. Hiti Invs. LLC, 111 So. 3d 1270 (Miss. Ct. App. 2013).

Circuit court did not abuse its discretion when finding that a passenger failed to prove good cause for her failure to serve an employee within the 120 days of filing her complaint because the passenger chose to do very little in attempting to effect service of process on the employee; the passenger made two phone calls to the process server, which did not rise to the level of due diligence or good cause. Sykes v. Home Health Care Affiliates, Inc., — So. 3d —, 2012 Miss. App. LEXIS 602 (Miss. Ct. App. Oct. 2, 2012), opinion withdrawn by, substituted opinion at, remanded en banc by 125 So. 3d 107, 2013 Miss. App. LEXIS 665 (Miss. Ct. App. 2013).

Jurisdiction.

Chancery court did not err in finding that it had personal jurisdiction over appellant because although appellant was not served with Miss. R. Civ. P. 4 process, he entered an appearance when his attorney filed a responsive pleading on his behalf and was subjected to the jurisdiction of the chancery court; the responsive pleading, without a Miss. R. Civ. P. 12(b) defense asserted, waived defendant's right to contest personal jurisdiction. Richard v. Garma-Fernandez, 121 So. 3d 929 (Miss. Ct. App. 2013), writ of certiorari denied by 121 So. 3d 918, 2013 Miss. LEXIS 497 (Miss. 2013).

Service of process.

Because a homeowner's rights regarding the motion for substitution were not affected by the failure to serve the decedent's successors, service was not mandatory, and the service executed upon the homeowner's attorney was sufficient to trigger the ninety-day time period; there existed no estate upon which or personal representative upon whom the suggestion of death could have been served. Clark v. Knesal, 113 So. 3d 531 (Miss. 2013).

Retroactive application of the decision in Bloodgood v. Leatherwood, 25 So. 3d 1047 (Miss. 2010) by a trial court that determined that service by mail in 2006 that was returned "unclaimed" was ineffective service was not unfair because appellate decisions were routinely applied retroactively and because the holding in Bloodgood was readily apparent from the language of Miss. R. Civ. P. 4(f) itself. Yarbrough v. Hiti Invs. LLC, 111 So. 3d 1270 (Miss. Ct. App. 2013).

Information in the record appeared to be insufficient to show process in a replevin action was properly made where there was not a complete, signed return showing proof of service as required by Miss. R. Civ. P. 4(f), and the return did not make clear who was served with process or whether the requirements of Rule 4(d) were met; regardless of these deficiencies, defendant appeared at the proper courthouse on the correct date. Magee v. Covington County Bank, 119 So. 3d 1053 (Miss. Ct. App. 2012), writ of certiorari denied by 119 So. 3d 328, 2013 Miss. LEXIS 408 (Miss. 2013).

Statute of limitations.

Circuit court erred in dismissing a litigant's complaint for insufficient service of process because the 120-day time period for service had not expired by the time that the Board of Certified Court Reporters filed its motion to dismiss for insufficient service of process and there was no evidence that the litigant would not or could not properly serve the Attorney General before the time limit expired. Davis v. Miss. Bd. of Certified Court Re-

porters, 126 So. 3d 982 (Miss. Ct. App. 2013).

Circuit court did not err in granting an employer summary judgment in a passenger's action to recover for injuries she sustained when a vehicle driven by an employee collided with the vehicle in which she was riding because the employee was not timely served within 120 days under Miss. R. Civ. P. 4(h), and the statute of limitations as to him expired; since the claims against the employer were wholly derivative of the employee's actions, the claims against the employer were barred. Sykes v. Home Health Care Affiliates, Inc., — So. 3d —, 2012 Miss. App. LEXIS 602 (Miss. Ct. App. Oct. 2, 2012), opinion withdrawn by, substituted opinion at, remanded en banc by 125 So. 3d 107, 2013 Miss. App. LEXIS 665 (Miss. Ct. App. 2013).

Under Miss. R. Civ. P. 4(h), the trial court abused its discretion by denying school district's and bus driver's motion to set aside the order granting the extension of time because substantial evidence did not support a finding of good cause for the driver's failure to serve the school district and bus driver within the required 120-day period. Thus, the other driver was not entitled to an extension of time to effect service, the statute of limitations had expired, and the complaint was subject to dismissal with prejudice. Copiah County Sch. Dist. v. Buckner, 61 So. 3d 162 (Miss. 2011).

Waiver.

Plaintiffs in a personal injury action were required to serve a minor defendant with process because he was clearly over the age of twelve, and defendants did not waiver their right to pursue their affirmative defenses of insufficiency of process and insufficiency of service of process because filing the answer that contained the affirmative defenses and responding to requests for admissions constituted only minimal participation in the litigation. Standifer v. Boren, 111 So. 3d 1267 (Miss. Ct. App. 2013).

Rule 5. Service and filing of pleadings and other papers.

JUDICIAL DECISIONS

Applicability.
Service upon attorney.
Service upon party.

Applicability.

Notice of the transfer of structured settlement payment rights required under Miss. Code Ann. § 11-5-11(2) requires a return for a date certain similar to the procedure authorized in Miss. R. Civ. P. 81(d)(5); once the original notice is provided to an interested party, notice of subsequent proceedings must comply with Miss. R. Civ. P. 5. RSL Funding, LLC v. Saucier (In re Saucier), — So. 3d —, 2013 Miss. App. LEXIS 133 (Miss. Ct. App. Mar. 26, 2013), writ of certiorari denied by 2014 Miss. LEXIS 71 (Miss. Jan. 30, 2014), writ of certiorari denied by 2014 Miss. LEXIS 74 (Miss. Jan. 30, 2014).

Service upon attorney.

Because a homeowner's rights regarding the motion for substitution were not affected by the failure to serve the decedent's successors, service was not mandatory, and the service executed upon the homeowner's attorney was sufficient to trigger the ninety-day time period; there existed no estate upon which or personal representative upon whom the suggestion of death could have been served. Clark v. Knesal, 113 So. 3d 531 (Miss. 2013).

Service upon party.

Summary judgment was appropriate because the record revealed no evidence of prejudice, or even a claim of prejudice, suffered by the owners of a condominium unit from the alleged lack of proper electronic notice of the summary judgment hearing. Furthermore, the trial court's order stated that the condominium association's motion for summary judgment on the owner's claims was properly noticed for hearing. Robohm v. Wheeler Roofing, Inc., — So. 3d —, 2013 Miss. App. LEXIS 595 (Miss. Ct. App. Sept. 17, 2013).

Rule 6. Time.

JUDICIAL DECISIONS

Computations.
Enlargement of time.
Excusable neglect.

Computations.

Former husband was not untimely added as a permissible party because although the husband filed a motion to amend the judgment eleven days after the former wife obtained a settlement order, the final day in the applicable period fell on a Sunday. Cooper v. Estate of Gatwood, 119 So. 3d 1031 (Miss. 2013).

Enlargement of time.

Trial court properly determined that failure to identify the successors or representatives of a decedent's estate did not toll the ninety-day time period for substitution because no identification of the successors or representatives was required. Clark v. Knesal, 113 So. 3d 531 (Miss. 2013).

Insured's claims against her insurer for uninsured motorist benefits was properly dismissed because she failed to serve the insurer within the 120-day time limit of Miss. R. Civ. P. 4(h); although she filed a motion for enlargement of time, she never obtained a ruling on that motion, and she failed to show good cause for the delay. Edwards v. State Farm Mut. Ins. Co., 117 So. 3d 639 (Miss. Ct. App. 2013).

Responses to requests for admissions were filed by the proper deadline because the requests were served by mail and, pursuant to Miss. R. Civ. P. 6(e), the end of the thirty-day period to respond fell on a Sunday, which, pursuant to Miss. R. Civ. P. 6(a), extended the period to respond to the following day, Monday. Bell v. Miss. Dep't of Human Servs., 126 So. 3d 999 (Miss. Ct. App. 2013).

Excusable neglect.

Trial court did not abuse its discretion in filing to find a homeowner's delay in responding to a suggestion of death resulted from excusable neglect because the homeonwer was able to plead his case for excusable neglect fully at the hearing on the motion for substitution and dismissal; a motion for substitution may be granted after the ninety-day period only upon a showing of excusable neglect. Clark v. Knesal, 113 So. 3d 531 (Miss. 2013).

CHAPTER III. PLEADINGS AND MOTIONS

Rule 7. Pleadings allowed; form of motions.

JUDICIAL DECISIONS

Construction.

When a husband filed his counterclaim 36 days after the final judgment in his divorce was entered, without a motion asking the court to allow him to amend the pleadings or to allow the untimely counterclaim, the counterclaim was not properly before the court under Miss. R. Civ. P. 7(b)(1) and Miss. R. Civ. P. 13(e) and (f). McNeese v. McNeese, 119 So. 3d 264 (Miss. 2013).

Rule 8. General rules of pleading.

JUDICIAL DECISIONS

Sufficiency of pleadings.

Veteran's claim of civil conspiracy was properly dismissed under Miss. R. Civ. P. 12(b)(6), as despite the notice pleading of Miss. R. Civ. P. 8, the veteran's complaint did not state that an agreement, unlawful or otherwise, was made by defendants, such that a claim was not properly stated; conclusory allegations or legal conclusions did not suffice to defeat the dismissal

motion. Cook v. Wallot, — So. 3d —, 2013 Miss. App. LEXIS 245 (Miss. Ct. App. May 7, 2013).

Rule 11. Signing of pleadings and motions.

JUDICIAL DECISIONS

Frivolousness.
Particular cases.
Sanctions.

Frivolousness.

Circuit court did not err in finding that sanctions and attorneys fees were proper because it found that a former wife's attorney intentionally had misrepresented the terms of an order to obtain a writ of garnishment, and the attorney had been sanctioned under similar circumstances; the attorney could not, in good faith, have believed that the wife's suggestion for writ of garnishment would succeed Cooper v. Estate of Gatwood, 119 So. 3d 1031 (Miss. 2013).

Particular cases.

Trial court abused its discretion in granting a timber company's request for sanctions after the property owners over which the company had been granted a private road easement were unsuccessful on their post-trial motion. It was not hopeless to ask the trial court to change its mind based on the property owners' argument that the trial court had misapplied the law regarding the necessity of the private road. May v. Adirondack Timber I, LLC, — So. 3d —, 2013 Miss. App. LEXIS 433 (Miss. Ct. App. July 16, 2013).

Appellant's attorney was properly ordered to pay an estate's attorneys' fees under Miss. R. Civ. P. 11, as counsel's arguments on the issue of his standing to contest the will were frivolous, his filings contained misrepresented facts, and the estate was forced to incur unnecessary attorney's fees in responding to those filings. Covington v. McDaniel (In re Estate of Necaise), 126 So. 3d 49 (Miss. Ct. App. 2013), writ of certiorari denied by 125 So. 3d 658, 2013 Miss. LEXIS 598 (Miss. 2013), writ of certiorari denied by 125 So. 3d 658, 2013 Miss. LEXIS 601 (Miss. 2013), writ of certiorari denied by 125 So. 3d 658, 2013 Miss. LEXIS 610 (Miss. 2013).

Sanctions.

Because appellant's complaint presented a viable legal theory regarding the amount of damages she sustained after she was sprayed with gasoline from a leaking gas-pump hose at a gas station owned by appellee, the award of sanctions was inappropriate. Dyse v. BKS, Inc., — So. 3d —, 2013 Miss. App. LEXIS 568 (Miss. Ct. App. Sept. 10, 2013).

Rule 13. Counter-claim and cross-claim.

JUDICIAL DECISIONS

Construction.

When a husband filed his counterclaim 36 days after the final judgment in his divorce was entered, without a motion asking the court to allow him to amend the pleadings or to allow the untimely counterclaim, the counterclaim was not properly before the court under Miss. R. Civ. P. 7(b)(1) and Miss. R. Civ. P. 13(e) and (f). McNeese v. McNeese, 119 So. 3d 264 (Miss. 2013).

Rule 15. Amended and supplemental pleadings.

JUDICIAL DECISIONS

Amendment of pleadings.
Dismissal.

Amendment of pleadings.

Trial court did not abuse its discretion by denying a vehicular accident victim's motion to amend to amend the victim's complaint to assert that the victim's sibling was a resident of their parent's home, and thus that the victim was entitled to coverage under the sibling's insurance policy, because defendant did not explore that issue. Howell v. USAA Cas. Ins. Co., 122 So. 3d 800 (Miss. Ct. App. 2013).

Dismissal.

As a veteran did not seek to amend his complaint after it was dismissed pursuant to Miss. R. Civ. P. 12(b)(6) and 15(a), an appellate court's review of the dismissal was limited to the allegations in the complaint, which were taken as true. Cook v. Wallot, — So. 3d —, 2013 Miss. App. LEXIS 245 (Miss. Ct. App. May 7, 2013).

CHAPTER IV. PARTIES

Rule 19. Joinder of persons needed for just adjudication.

JUDICIAL DECISIONS

Interest in litigation.
Parties; necessary.
Parties; unnecessary.
Subrogation in workers' compensation cases.
Timeliness.

Interest in litigation.

If a landowner's spouse and adult child claimed an interest in a property which a utility sought to acquire in a quick-take condemnation action, their claim was against the landowner only because a warranty deed purporting to convey an interest in the subject property was misfiled in the wrong judicial district. Harrison County Util. Auth. v. Walker, — So. 3d —, 2014 Miss. App. LEXIS 19 (Miss. Ct. App. Jan. 14, 2014).

Parties; necessary.

Daughter had to be joined as a necessary party pursuant to Miss. R. Civ. P. 19(a)(2) because her mother gave her a warranty deed to some of the property at issue, and since the daughter's title to the property she was deeded was likely to prove to be only as good as the mother's title, the daughter had an undeniable interest in the litigation that was distinct from the mother's interest; before rendering a judgment the trial court had to, at the minimum, notify the daughter and allow her a "meaningful" opportunity to be heard. Powell v. Evans, 113 So. 3d 1270 (Miss. Ct. App. 2013).

Parties; unnecessary.

Landowner's spouse and adult child were not necessary parties in a quick-take condemnation action brought by a utility because a warranty deed purporting to convey an ownership interest in the subject property to them was filed in the wrong judicial district. Harrison County Util. Auth. v. Walker, — So. 3d —, 2014 Miss. App. LEXIS 19 (Miss. Ct. App. Jan. 14, 2014).

Subrogation in workers' compensation cases.

With respect to an employer's or workers' compensation insurer's right to subrogation, Miss. Code Ann. § 71-3-71 allows them to either join or intervene in a third party action filed by an injured worker, and either will suffice to protect the insurer's or employer's right to reimbursement. Liberty Mut. Ins. Co. v. Shoemake, 111 So. 3d 1207 (Miss. 2013).

Workers' compensation insurer could not file a separate subrogation action under Miss. Code Ann. § 71-3-71 against an injured worker after he settled a third-party action in Alabama and reimbursed the insurer only the amount it was en-

titled to under Alabama law, as the insurer had notice of the action but did not join or intervene in that suit. Liberty Mut. Ins. Co. v. Shoemake, 111 So. 3d 1207 (Miss. 2013).

Timeliness.

Former husband was not untimely added as a permissible party because although the husband filed a motion to amend the judgment eleven days after the former wife obtained a settlement order, the final day in the applicable period fell on a Sunday. Cooper v. Estate of Gatwood, 119 So. 3d 1031 (Miss. 2013).

Circuit court had authority to add a former husband to the garnishment proceeding between his former wife and his employer because the husband possessed a sufficient interest to be joined; the husband's personal property was under the employer's control, and he asserted that the wife obtained title and possession to that property through fraudulent misrepresentation. Cooper v. Estate of Gatwood, 119 So. 3d 1031 (Miss. 2013).

Rule 24. Intervention.

JUDICIAL DECISIONS

Effect of failure to intervene.
Intervention as of right.

Effect of failure to intervene.

Workers' compensation insurer could not file a separate subrogation action under Miss. Code Ann. § 71-3-71 against an injured worker after he settled a third-party action in Alabama and reimbursed the insurer only the amount it was entitled to under Alabama law, as the insurer had notice of the action but did not join or intervene in that suit. Liberty Mut. Ins. Co. v. Shoemake, 111 So. 3d 1207 (Miss. 2013).

Intervention as of right.

With respect to an employer's or workers' compensation insurer's right to subrogation, Miss. Code Ann. § 71-3-71 allows them to either join or intervene in a third party action filed by an injured worker, and either will suffice to protect the insurer's or employer's right to reimbursement. Liberty Mut. Ins. Co. v. Shoemake, 111 So. 3d 1207 (Miss. 2013).

Rule 25. Substitution of parties.

JUDICIAL DECISIONS

Death.
Transfers of interest.

Death.

Trial court did not abuse its discretion in filing to find a homeowner's delay in responding to a suggestion of death resulted from excusable neglect because the homeonwer was able to plead his case for excusable neglect fully at the hearing on the motion for substitution and dismissal; a motion for substitution may be granted after the ninety-day period only upon a showing of excusable neglect. Clark v. Knesal, 113 So. 3d 531 (Miss. 2013).

Given that dismissal was not contingent upon the filing of a motion, the trial court acted in accordance with the rule when it dismissed a decedent; the rule does not require a motion to dismiss to be filed, nor does it limit who may file such a motion if one is filed. Clark v. Knesal, 113 So. 3d 531 (Miss. 2013).

Decedent's attorney could file the suggestion of death because the rule was silent as to who could file the suggestion of death; since the rule is silent as to who may file the suggestion of death, an attorney may file the suggestion for a deceased client. Clark v. Knesal, 113 So. 3d 531 (Miss. 2013).

Because a homeowner's rights regarding the motion for substitution were not affected by the failure to serve the decedent's successors, service was not mandatory, and the service executed upon the homeowner's attorney was sufficient to trigger the ninety-day time period; there existed no estate upon which or personal representative upon whom the suggestion

of death could have been served. Clark v. Knesal, 113 So. 3d 531 (Miss. 2013).

Trial court properly determined that failure to identify the successors or representatives of a decedent's estate did not toll the ninety-day time period for substitution because no identification of the successors or representatives was required. Clark v. Knesal, 113 So. 3d 531 (Miss. 2013).

Transfers of interest.

Chancellor properly joined a trust to a lawsuit, instead of substituting the trust for a decedent's estate, because while it appeared that the estate had transferred its interest to the trust, the validity of that transfer was in question. Borne v. Estate of T. L. Carraway, 118 So. 3d 571 (Miss. 2013).

CHAPTER V. DEPOSITIONS AND DISCOVERY

Rule 26. General provisions governing discovery.

JUDICIAL DECISIONS

Expert testimony.
Expert witnesses.

Expert testimony.

Expert's testimony about appellant's alleged lost profits was properly excluded, as the trial court found that appellant's expert discovery disclosures for lost net profits under Miss. R. Civ. P. 26(b)(4)(A)(i) were not presented in a meaningful way since it appeared the expert was only calculating lost gross profits and not the required lost net profits. Coastal Hardware & Rental Co., LLC v. Certain Underwriters at Lloyds, London, 120 So. 3d 1017 (Miss. Ct. App. 2013).

Expert witnesses.

Trial court properly granted summary judgment to defendant on the basis that plaintiff failed to give defendant advance notice of the opinion testimony of plaintiff's expert so as to allow defendant to meaningfully cross-examine the expert at his deposition given that plaintiff's failure to designate the expert as an expert witness clearly constituted a discovery violation, and plaintiff had not provided any reason why she was unable to formally designate the expert as an expert witness and comply with the scheduling order. Buckley v. Singing River Hosp., — So. 3d —, 2013 Miss. App. LEXIS 691 (Miss. Ct. App. Oct. 15, 2013).

Rule 30. Depositions upon oral examination.

JUDICIAL DECISIONS

Admissibility.

Deposition of one party's counsel was admissible into evidence because Miss. R. Civ. P. 30(a) permitted either party to take a deposition of any person, Miss. R. Civ. P. 32(a)(3) permitted the admission of the deposition in the absence of the witness, and the counsel was authorized, under Miss. R. Evid. 801(d)(2)(C), to make the statement that co-counsel had informed the counsel the borrowers had accepted a settlement agreement. Williams v. Homecomings Fin. Network, — So. 3d —, 2012 Miss. App. LEXIS 827 (Miss. Ct. App. June 5, 2012).

Rule 32. Use of depositions in court proceedings.

JUDICIAL DECISIONS

Illustrative cases.

Deposition of one party's counsel was admissible into evidence because Miss. R. Civ. P. 30(a) permitted either party to take a deposition of any person, Miss. R. Civ. P. 32(a)(3) permitted the admission of the deposition in the absence of the witness, and the counsel was authorized, under Miss. R. Evid. 801(d)(2)(C), to make the statement that co-counsel had informed the counsel the borrowers had accepted a settlement agreement. Williams v. Homecomings Fin. Network, — So. 3d —, 2012 Miss. App. LEXIS 827 (Miss. Ct. App. June 5, 2012).

Rule 33. Interrogatories to parties.

JUDICIAL DECISIONS

Timeliness.

Responses to requests for admissions were filed by the proper deadline because the requests were served by mail and, pursuant to Miss. R. Civ. P. 6(e), the end of the thirty-day period to respond fell on a Sunday, which, pursuant to Miss. R. Civ. P. 6(a), extended the period to respond to the following day, Monday. Bell v. Miss. Dep't of Human Servs., 126 So. 3d 999 (Miss. Ct. App. 2013).

Rule 36. Requests for admission.

JUDICIAL DECISIONS

Deemed admission.
Time to respond.
Withdrawal or amendment.

Deemed admission.

Chancellor erred in awarding grandparents visitation because they failed to show they met the criterion of the establishment of a viable relationship with their granddaughters; the chancellor erred in ignoring the grandparents' admissions and permitting contradictory testimony that they had contributed financially and had frequently visited the grandchildren because they never moved for withdrawal or amendment of their admissions. Aydelott v. Quartaro, 124 So. 3d 97 (Miss. Ct. App. 2013).

Trial court did not abuse its discretion in deeming a company's request for admissions under Miss. R. Civ. P. 36 as admitted because through his attorneys, a stock purchaser moved for and received a continuance of the hearing on the motion, and his attorney appeared at the hearing and conceded the motion; the purchaser never filed a response to the motion to have the request deemed admitted, Tyler v. Auto. Fin. Co., 113 So. 3d 1236 (Miss. 2013).

Trial court erred when it did not deem admitted a landowner's requests for admissions from a contractor because the contractor failed to timely respond under Miss. R. Civ. P. 36 and never moved to have the admissions withdrawn or amended; as a result, the trial court erred in granting summary judgment to the contractor on the landowner's breach of contract claim because the admissions were sufficient to establish the claim. Montgomery v. Stribling, 115 So. 3d 823 (Miss. Ct. App. 2012), writ of certiorari denied by 2013 Miss. LEXIS 358 (Miss. June 20, 2013).

Time to respond.

Trial court did not err in denying a stock purchaser's motion to amend admissions when it was filed years after the fact and after the entry of a final judgment because the purchaser waited almost four years after the hearing to file a motion to amend his admissions and, thereby, obtain relief from the trial court's order deeming them admitted; the purchaser failed to file the

motion within a reasonable time pursuant to Miss. R. Civ. P. 60(b) when he waited almost four years and until after a final judgment had been entered to file his motion for relief. Tyler v. Auto. Fin. Co., 113 So. 3d 1236 (Miss. 2013).

Withdrawal or amendment.

It was within a trial judge's discretion to deny a former employee's request to withdraw deemed-admitted responses because, although the employee's counsel offered a reasonable explanation for counsel's initial failure to respond — not receiving the employer's requests for admissions — counsel gave no justifiable explanation for counsel's continued failure to respond after receipt of the employer's good-faith letter giving counsel more time to respond. Rainer v. Wal-Mart Assocs., Inc., 119 So. 3d 398 (Miss. Ct. App. 2013).

Rule 37. Failure to make or cooperate in discovery: sanctions.

JUDICIAL DECISIONS

Requirements.
Sanctions available.

Requirements.

Imposition of a joint and several monetary sanction against plaintiff and its attorney due to discovery misconduct and false answers to interrogatories was proper in its action that arose from conduct by former employees with a competitor, despite the absence of a motion to compel because such a motion would have been futile due to plaintiff's tactics throughout the matter. Eaton Corp. v. Frisby, — So. 3d —, 2013 Miss. LEXIS 596 (Miss. Nov. 21, 2013).

Sanctions available.

Imposition of a joint and several monetary sanction against plaintiff and its attorney due to discovery misconduct and false answers to interrogatories was not an abuse of discretion in its action arising from former employees' conduct with a competitor, as plaintiff asserted a privilege but it failed to identify any of the "privileged" documents; further, its invocation of the privilege was in conjunction with a false and misleading response. Eaton Corp. v. Frisby, — So. 3d —, 2013 Miss. LEXIS 596 (Miss. Nov. 21, 2013).

Imposition of a joint and several monetary sanction against plaintiff and its attorney for "intentional discovery violations" was not an abuse of discretion in its action that arose from conduct by former employees with a competitor because plaintiff took affirmative actions to conceal a consulting agreement, such as responding falsely to an interrogatory. Eaton Corp. v. Frisby, — So. 3d —, 2013 Miss. LEXIS 596 (Miss. Nov. 21, 2013).

Trial court properly granted summary judgment to defendant on the basis that plaintiff failed to give defendant advance notice of the opinion testimony of plaintiff's expert so as to allow defendant to meaningfully cross-examine the expert at his deposition given that plaintiff's failure to designate the expert as an expert witness clearly constituted a discovery violation, and plaintiff had not provided any reason why she was unable to formally designate the expert as an expert witness and comply with the scheduling order. Buckley v. Singing River Hosp., — So. 3d —, 2013 Miss. App. LEXIS 691 (Miss. Ct. App. Oct. 15, 2013).

CHAPTER VI. TRIALS

Rule 41. Dismissal of actions.

JUDICIAL DECISIONS

In general.
Applicability.
Dismissal not warranted.
Failure to prosecute.

In general.

Motion for involuntary dismissal applies to cases tried without a jury and may be made by the defendant after the plaintiff presents its evidence. The trial judge, who is also the trier of fact, then considers the evidence fairly and determines whether or not the evidence which has not been rebutted would entitle the plaintiff to a judgment. W.R. Berkley Corp. v. Rea's Country Lane Constr., - - So. 3d —, 2013 Miss. App. LEXIS 464 (Miss. Ct. App. July 30, 2013).

Applicability.

Although a motion at the conclusion of the claimant's case-in-chief was described as a motion for a directed verdict at trial and on appeal, the motion was technically one for a Miss. R. Civ. P. 41 involuntary dismissal, as the civil case was tried before a judge, not a jury. Crowell v. Butts, — So. 3d —, 2013 Miss App. LEXIS 866 (Miss. Ct. App. Dec. 10, 2013).

Dismissal not warranted.

Circuit court properly reversed the county court's dismissal of a negligence suit filed by appellants against appellee, because appellants filed a motion for summary judgment within 30 day of the clerk's Miss. R. Civ. P. 41(d) notice to all counsel, which was a sufficient "action of record" to avoid dismissal for want of prosecution. Cascio v. Alfa Mut. Ins. Co., — So. 3d —, 2013 Miss. App. LEXIS 849 (Miss. Ct. App. Dec. 6, 2013).

Failure to prosecute.

Where appellant allowed her medical negligence case to languish for over a year, repeatedly failed to submit timely and sufficient responses to discovery, and did not disclose the basis for her claim until over two years after the responses were requested, the trial court did not abuse its discretion in finding that a sanction lesser than dismissal would not cure the prejudice suffered by the doctor due to the delayed and dilatory disclosure. Cornelius v. Benefield, — So. 3d —, 2013 Miss. App. LEXIS 558 (Miss. Ct. App. Sept. 3, 2013).

Rule 42. Consolidation: separate trials.

JUDICIAL DECISIONS

In general.

Trial court abused its discretion in dismissing an injured employee's suit against a building owner because the identity of parties element had not been met and there was another option available when multiple cases were filed involving the same operative questions of law or fact, one that could be employed even when there were different parties: consolidation. Smith v. Normand Children Diversified Class Trust, 122 So. 3d 1234 (Miss. Ct. App. 2013).

There was no error by the consolidation of two workers' compensation cases, arising from separate accidents and separate injuries, as the employee was not prejudiced in any way. Tucker v. Bellsouth Telcoms., Inc., — So. 3d —, 2013 Miss. App. LEXIS 357 (Miss. Ct. App. June 18, 2013), writ of certiorari denied by 2014 Miss. LEXIS 48 (Miss. Jan. 16, 2014), writ of certiorari denied by 2014 Miss. LEXIS 39 (Miss. Jan. 16, 2014).

Rule 46. Exceptions unnecessary.

JUDICIAL DECISIONS

Where the trial court dismissed appellant's medical-malpractice claim with prejudice for failure to prosecute, its finding of delay and contumacious conduct was supported by evidence that appellant allowed the case to languish for over a year, repeatedly failed to submit timely and sufficient responses to discovery, submitted untimely discovery requests, and did not disclose the basis for her claim

until over two years after the responses were requested. Cornelius v. Benefield, — So. 3d —, 2013 Miss. App. LEXIS 558 (Miss. Ct. App. Sept. 3, 2013).

Rule 50. Motions for a directed verdict and for judgment notwithstanding the verdict.

JUDICIAL DECISIONS

Applicability.
Judgment notwithstanding the verdict.

Applicability.

In cases tried before a jury, a motion for directed verdict is allowed at the close of the plaintiff's case-in-chief. W.R. Berkley Corp. v. Rea's Country Lane Constr., — So. 3d —, 2013 Miss. App. LEXIS 464 (Miss. Ct. App. July 30, 2013).

Motion for a directed verdict under Miss. R. Civ. P. 50 does not apply to cases tried without a jury. Crowell v. Butts, — So. 3d —, 2013 Miss. App. LEXIS 866 (Miss. Ct. App. Dec. 10, 2013).

Judgment notwithstanding the verdict.

Motion for a judgment notwithstanding the verdict is made post-judgment, after the trier of fact has considered all the evidence — both the plaintiff's and the defendant's. The trial judge considers the evidence in the light most favorable to the verdict and determines whether substantial evidence supports the verdict. W.R. Berkley Corp. v. Rea's Country Lane Constr., — So. 3d —, 2013 Miss. App. LEXIS 464 (Miss. Ct. App. July 30, 2013).

Rule 52. Findings by the court.

JUDICIAL DECISIONS

In general.
Findings.

In general.

If a litigant is unsatisfied because an order did not recite a chancellor's findings regarding the denial of the litigant's requests for a citation of contempt and an injunction, the litigant could ask the chancellor to find the facts specially and state separately the chancellor's conclusions of law thereon within ten days following the entry of the final judgment. James v. James, — So. 3d —, 2013 Miss. App. LEXIS 805 (Miss. Ct. App. Nov. 26, 2013).

Findings.

Because a circuit court was sitting as an appellate court in reviewing an administrative committee's decision, the court was not required to issue findings of fact. Jones v. Alcorn State Univ., 120 So. 3d 448 (Miss. Ct. App. 2013).

Since a mother failed to raise to the chancellor her challenge to the reasonableness of the child-support guidelines, she was barred from challenging the chancellor's failure to make specific findings of fact on the reasonableness of the guidelines. Robinson v. Brown, 58 So. 3d 38 (Miss. Ct. App. 2011).

CHAPTER VII. JUDGMENT

Rule 54. Judgments; costs.

JUDICIAL DECISIONS

Appeal.
Timeliness.
Illustrative cases.

Appeal.

Appellate court lacked jurisdiction to consider the merits of a case because a

chancellor's order—that the purported heirs' claims for establishment as children of their putative deceased father were barred by Miss. Code § 91-1-15—was not certified, did not include all parties, was amended after the appeal was filed, and the purported heirs neither sought nor received permission to proceed with an interlocutory appeal. Young v. Pollion (In re Gardner), 126 So. 3d 95 (Miss. Ct. App. 2013).

Timeliness.

As a trial court did not abuse its discretion in holding that the dismissal of a particular defendant was a final, appealable judgment under Miss. R. Civ. P. 54(b), an appeal was untimely under Miss. R. App. P. 4(a) where it was taken from a later order that dismissed the remaining defendants. Cook v. Wallot, — So. 3d —, 2013 Miss. App. LEXIS 245 (Miss. Ct. App. May 7, 2013).

Illustrative cases.

Circuit court's judgment to deny an employer's motion to confirm an arbitration award (but not to vacate the award) was a final judgment, and the appellate court had jurisdiction to consider the appeal because the former employee was time-barred from contesting the confirmation of the award. Wells Fargo Advisors, LLC v. Runnels, 126 So. 3d 137 (Miss. Ct. App. 2013).

Owner's appeal was dismissed for lack of jurisdiction because his personal injury complaint alleged multiple claims against three parties, the circuit court's grant of summary judgment to an inspector lacked a final judgment certification, and there was no evidence the Mississippi Supreme Court granted permission to appeal an interlocutory order. Clausell v. Bourque, 122 So. 3d 825 (Miss. Ct. App. 2013).

Son's appeal of a judgment of the chancery court awarding $ 4,000 of the $ 5,000 held in escrow to his siblings in a dispute regarding the distribution of their father's estate was dismissed for lack of jurisdiction as there was no Miss. R. Civ. P. 54(b) certification from the chancery court, and the allocation of the $ 1,000 in the trust account to the appropriate party was pending in the chancery court; the chancery court had not disposed of all the claims when the son perfected his appeal, making the appeal an interlocutory one. In re Conservatorship of Graves, — So. 3d —, 2013 Miss. App. LEXIS 237 (Miss. Ct. App. May 7, 2013).

Rule 55. Default.

JUDICIAL DECISIONS

Review.
Illustrative cases.

Review.

Because a husband did not challenge the granting of a divorce itself or the chancery court's decision to try the case in his absence, the husband's attempt to defend the case for the first time on appeal was improper, and the issues he raised were procedurally barred by Miss. Code Ann. § 93-5-7 (Rev. 2004) and Miss. R. Civ. P. 55(e). Lee v. Lee, 78 So. 3d 337 (Miss. Ct. App. 2011), reversed by, remanded by 78 So. 3d 326, 2012 Miss. LEXIS 36 (Miss. 2012).

Illustrative cases.

Canadian defamation-based default judgment against a Mississippi blogger was not enforceable under the Securing the Protection of our Enduring and Established Constitutional Heritage Act; Canadian law did not provide at least as much protection as provided by the First Amendment and Mississippi law for freedom of speech and press, as Canadian plaintiffs did not have to prove falsity as an element of a prima facie defamation case, and there were insufficient allegations of falsity to permit a default judgment under Mississippi law. Trout Point Lodge, Ltd. v. Handshoe, 729 F.3d 481 (5th Cir. 2013).

Rule 56. Summary judgment.

JUDICIAL DECISIONS

In general.

Motion for summary judgment is a pretrial motion that requires a trial judge to consider the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, in the light most favorable to the nonmovant and determine whether the plaintiff has presented sufficient evidence to create a fact issue on all the elements of the claims the plaintiff seeks to prove at trial. W.R. Berkley Corp. v. Rea's Country Lane Constr., — So. 3d —, 2013 Miss. App. LEXIS 464 (Miss. Ct. App. July 30, 2013).

Applicability.

Summary judgment was an appropriate means to determine the possessory rights to a recreational vehicle because the judge's use of Miss. R. Civ. P. 56 supplemented — and was not inconsistent with — the requirement under Miss. Code Ann. § 11-37-145 that replevins be resolved as early as possible. Lacoste v. Sys. & Servs. Techs., 126 So. 3d 111 (Miss. Ct. App. 2013).

Affidavits.

Loan servicer proved that it was entitled to possession of the borrowers' recreational vehicle (RV) through the affidavit of its employee and agent who was authorized to speak on its behalf. The affidavit provided that the loan servicer was the authorized servicing agent for a bank, which was the successor bank by a merger, and the title to the RV showed that predecessor bank was the lienholder on the RV, so that the successor bank became the lienholder of the RV. Lacoste v. Sys. & Servs. Techs., 126 So. 3d 111 (Miss. Ct. App. 2013).

Discovery.

Plaintiff was not entitled to additional time to seek affidavits proving the authenticity of photographs and written notations on the photographs because the plaintiff had sufficient time to seek any affidavits needed to oppose summary judgment and failed to do so. Estate of Luster v. Mardi Gras Casino Corp., 121 So. 3d 962 (Miss. Ct. App. 2013).

Rule 59. New trials; amendment of judgments.

JUDICIAL DECISIONS

Applicability.

Motion to set aside or reconsider an order granting summary judgment will be treated as a motion under Miss. R. Civ. P. 59(e). The movant must show: (i) an intervening change in controlling law; (ii) availability of new evidence not previously available; or (iii) need to correct a clear error of law or to prevent manifest injustice. Cattenhead v. Brantley, 119 So. 3d 1136 (Miss. Ct. App. 2013).

Limitations.

When, following dismissal of an insured's complaint against its insurer without prejudice, the insured filed a timely motion to alter or amend under Miss. R. Civ. P. 59(e), which the trial court did not rule on for five months, the statute of limitations applicable to the insured's claim was tolled during the pendency of the Rule 59(e) motion. Sweet Valley Missionary Baptist Church v. Alfa Ins. Corp., 124 So. 3d 643 (Miss. 2013).

Trial court erred in dismissing insured's refiled suit as time-barred, because the insured had filed a Miss. R. Civ. P. 59(e) motion to alter or amend the judgment dismissing its original suit, and the filing of that motion not only tolled the time for appeal and the enforceability of the judgment, it also tolled the statute of limitations until the trial court ruled on the motion. Sweet Valley Missionary Baptist

Church v. Alfa Ins. Corp., 124 So. 3d 683 (Miss. Ct. App. 2013), affirmed by, remanded by 124 So. 3d 643, 2013 Miss. LEXIS 574 (Miss. 2013).

Rule 60. Relief from judgment or order.

JUDICIAL DECISIONS

Applicability.

Since a father was not made a party defendant and did not file a consent to the adoption of his son, Miss. R. Civ. P. 60(b) was not applicable to the father's subsequent petition to set aside the adoption of his son. In re Adoption of a Minor Child v. M.J.W., 111 So. 3d 1243 (Miss. Ct. App. 2013).

Rule 61. Harmless error.

JUDICIAL DECISIONS

Illustrative Cases.

Although a trial court should have made a finding at the conclusion of an evidentiary hearing to submit the issue of punitive damages to the jury in a contractor's multi-count action against a law firm, as the firm failed to move for a directed verdict or object to the issue being submitted to the jury and there was sufficient evidence to support those damages, the error was harmless. Baker & McKenzie, LLP v. Evans, 123 So. 3d 387 (Miss. 2013).

Rule 62. Stay of proceedings to enforce a judgment.

JUDICIAL DECISIONS

Illustrative cases.

Trial court erred in enforcing a supersedeas bond against a city as a surety because the bond did not include two valid sureties or a surety company, and thus, the circuit clerk did not have the authority to receive it or issue supersedeas upon it; the city was not required to post a bond to stay the judgment and pursue its appeal because it was exempted by statute and procedural rule from the requirement to file a supersedeas bond. City of Belzoni v. Johnson, 121 So. 3d 216 (Miss. 2013).

Miss. R. Civ. P. 62(b) does not provide for an automatic stay upon the filing of a Miss. R. Civ. P. 59 or Miss. R. Civ. P. 60 motion. Therefore, no stay was in place that would have rendered the chancellor's final judgment of divorce invalid. McNeese v. McNeese, 119 So. 3d 264 (Miss. 2013).

CHAPTER VIII. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

Rule 65.1. Security: proceedings against sureties.

JUDICIAL DECISIONS

Municipality.

Trial court erred in enforcing a supersedeas bond against a city as a surety because the bond did not include two valid sureties or a surety company, and thus, the circuit clerk did not have the authority to receive it or issue supersedeas upon it; the city was not required to post a bond to stay the judgment and pursue its appeal because it was exempted by statute and

procedural rule from the requirement to file a supersedeas bond. City of Belzoni v. Johnson, 121 So. 3d 216 (Miss. 2013).

CHAPTER X. COURTS AND CLERKS

Rule 77. Courts and clerks.

JUDICIAL DECISIONS

Failure to comply.

General docket revealed that the circuit clerk did not comply with the requirements found in Miss. R. Civ. P. 77(d) because the Public Employees' Retirement System (PERS), an employee, and her counsel were never sent notice of the memorandum opinion and order of the circuit court from the circuit clerk's office; even if the deputy clerk sent notice to PERS, the clerk's office failed to document such notice in the docket, as required by Rule 77. In re Dunn, — So. 3d —, 2013 Miss. LEXIS 232 (Miss. Feb. 21, 2013).

Rule 79. Books and records kept by the clerk and entries therein.

JUDICIAL DECISIONS

Illustrative cases.

Circuit clerk adequately complied with Miss. Code Ann. § 9-7-171 and Miss. R. Civ. P. 79 because no evidence was adduced that a docket entry was backdated. In re Dunn, — So. 3d —, 2013 Miss. LEXIS 232 (Miss. Feb. 21, 2013).

Rule 81. Applicability of rules.

JUDICIAL DECISIONS

In general.
Applicability.
Notice.
Support proceedings.

In general.

Notice of the transfer of structured settlement payment rights under Miss. Code Ann. § 11-5-11(2) requires a return for a date certain similar to the procedure authorized in Miss. R. Civ. P. 81(d)(5); once the original notice is provided to an interested party, notice of subsequent proceedings must comply with Miss. R. Civ. P. 5. RSL Funding, LLC v. Saucier (In re Saucier), — So. 3d —, 2013 Miss. App. LEXIS 133 (Miss. Ct. App. Mar. 26, 2013), writ of certiorari denied by 2014 Miss. LEXIS 71 (Miss. Jan. 30, 2014), writ of certiorari denied by 2014 Miss. LEXIS 74 (Miss. Jan. 30, 2014).

Applicability.

Because the Mississippi Structured Settlement Protection Act, Miss. Code Ann. §§ 11-57-1 through 11-57-1-15, requires court approval of a transfer of structured settlement payment rights, a civil action is commenced by filing a complaint with the court; to obtain personal jurisdiction over an interested party, service of process is required consistent with either Miss. R. Civ. P. 4 or 81. RSL Funding, LLC v. Saucier (In re Saucier), — So. 3d —, 2013 Miss. App. LEXIS 133 (Miss. Ct. App. Mar. 26, 2013), writ of certiorari denied by 2014 Miss. LEXIS 71 (Miss. Jan. 30, 2014), writ of certiorari denied by 2014 Miss. LEXIS 74 (Miss. Jan. 30, 2014).

Notice.

Failure to issue a summons under this rule to an attorney, who was a former guardian, for a show-cause hearing regarding a past-due accounting did not violate the attorney's due process rights because notice was required for criminal contempt and the attorney was found in

civil contempt; the attorney had been dealing with the defectiveness of the accounting for two years, had already been held in contempt, never objected to the service of process, and explained his actions at the hearing. Zebert v. Guardianship of Baker, — So. 3d —, 2014 Miss. App. LEXIS 11 (Miss. Ct. App. Jan. 7, 2014).

Support proceedings.

Because a summons under this rule needed to be issued for the child support modification issue, and no summons under this rule was ever issued for the modification-of-child-support issue, the trial court had no jurisdiction to hear the case; because no hearing was held on the modification action, and a hearing was required under this rule to modify child support, that constituted reversible error. Curry v. Frazier, 119 So. 3d 362 (Miss. Ct. App. 2013).

MISSISSIPPI RULES OF EVIDENCE

ARTICLE I. GENERAL PROVISIONS

Rule 102. Purpose and construction.

JUDICIAL DECISIONS

Applicability.

As a trial court, on remand, failed to give defendant a meaningful opportunity to present evidence of prejudice with respect to the Barker factors for his speedy trial claim, arising from a forfeiture action initiated by the county, the remand order was not complied with and the evidence could not be properly weighed. One 1970 Mercury Cougar v. Tunica County, 115 So. 3d 792 (Miss. 2013).

Rule 103. Rulings on evidence.

JUDICIAL DECISIONS

In general.
Harmless error.
Offer of proof.
Substantial right.

In general.

Since plaintiff failed to make a proffer as to an expert's expected testimony, she was procedurally barred from appealing the exclusion of the expert's testimony. Howell v. Holiday, — So. 3d —, 2013 Miss. App. LEXIS 134 (Miss. Ct. App. Mar. 26, 2013).

Harmless error.

Even if a trial court erred in allowing a doctor to testify as to how an alleged victim of domestic violence received her injuries when the doctor gained that knowledge from records obtained from a hospital, the error was harmless because both the victim, her daughter, and a police officer who interviewed the victim in the hospital attributed the victim's injuries to an assault by defendant. Henry v. State, 124 So. 3d 87 (Miss. Ct. App. 2013), writ of certiorari denied by 123 So. 3d 450, 2013 Miss. LEXIS 559 (Miss. 2013).

Offer of proof.

Although defendant was authorized to offer specific instances of his murder victim's threats in order to support his claim of self-defense, as he failed to proffer any details of the alleged prior threats and the alleged prior violent instances were not clear, there could be no abuse of discretion with respect to the trial court's evidentiary rulings. Davis v. State, — So. 3d —, 2013 Miss. App. LEXIS 490 (Miss. Ct. App. Aug. 13, 2013), writ of certiorari denied by 2014 Miss. LEXIS 73 (Miss. Jan. 30, 2014).

In an action arising from a motor vehicle accident, whether testimony regarding the speed at which the driver was traveling at the time of the accident was properly excluded was waived for purposes of appellate review because a proffer was not made. Heflin v. Merrill, — So. 3d —, 2013 Miss. App. LEXIS 688 (Miss. Ct. App. Oct. 15, 2013).

Substantial right.

Trial court's exclusion of opinion testimony from the defense witnesses that the victim was reaching for a weapon when defendant shot him did not violate defendant's right to present a meaningful defense and did not constitute reversible error because two of the defense witnesses testified that the victim was reaching behind his back during their exchange, from which the jury was free to infer that the victim was going for a gun; defendant testified that the victim was the aggressor and that the victim had previously threat-

ened him with a pistol and even shot at him a little over a week earlier; and defendant testified that he believed the victim was reaching for a gun when he shot him. Love v. State, 121 So. 3d 952 (Miss. Ct. App. 2013).

While the trial court erred by sustaining the State's hearsay objection, the error was not reversible because defendant's substantial rights were not affected by the exclusion of the statement where it was cumulative of defendant's own testimony. Pauley v. State, 113 So. 3d 557 (Miss. 2013).

Rule 105. Limited admissibility.

JUDICIAL DECISIONS

Limiting instructions.

Since a property owner failed to request a limiting instruction as a result of statements made by opposing counsel, the court could not find that the trial court committed error in not giving a limiting instruction. Gilmer v. Morris Goodman Builders, Inc., — So. 3d —, 2013 Miss. App. LEXIS 397 (Miss. Ct. App. June 25, 2013).

ARTICLE II. JUDICIAL NOTICE

Rule 201. Judicial notice of adjudicative facts.

JUDICIAL DECISIONS

Illustrative cases.

In a driving under the influence case, the State established the court's jurisdiction; although the arresting officer did not testify that the events occurred in the relevant city and county, there was direct and circumstantial evidence to show the crimes occurred there, and the court properly took judicial notice that the area where defendant was stopped was within the city. Russell v. State, 126 So. 3d 145 (Miss. Ct. App. 2013).

ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule 401. Definition of "relevant evidence."

JUDICIAL DECISIONS

Criminal history.
Illustrative cases.

Criminal history.

State of Mississippi was permitted to impeach defense witnesses, who testified at a sentencing hearing as to defendant's good character, by asking if the witnesses were aware that defendant had pleaded guilty to a felony charge of credit-card fraud. Batiste v. State, 121 So. 3d 808 (Miss. 2013).

Illustrative cases.

Even though a trial court properly excluded evidence of a contractor's other companies on the question of liability in his multi-claim action, alleging legal malpractice and other claims that arose from the destruction in value of his business, the evidence was relevant for damages with respect to the alleged harm caused to him. Baker & McKenzie, LLP v. Evans, 123 So. 3d 387 (Miss. 2013).

In an action arising from a motor vehicle accident, the trial court did not err in excluding, by a motion in limine, the motorist's uninsured insurer's name and existence because liability was not an issue in the case and the parties had stipulated to the insurer's responsibility up to the policy limits, such that it was not relevant. Heflin v. Merrill, — So. 3d —, 2013

Miss. App. LEXIS 688 (Miss. Ct. App. Oct. 15, 2013).

Rifle and the pictures of the rifle were relevant evidence at defendant's murder trial where: (1) the cases and shells at the crime scene were of the same class as defendant's rifle; (2) the photograph of the rifle and the rifle matched the description of the murder weapon; (3) the pictures of the rifle were taken in defendant's bedroom before the shooting; and (4) the rifle went missing after the shooting until defendant's mother gave it to the police. Lawrence v. State, 124 So. 3d 91 (Miss. Ct. App. 2013), writ of certiorari denied by 123 So. 3d 450, 2013 Miss. LEXIS 555 (Miss. 2013).

Trial court did not abuse its discretion in sustaining the State's relevance objections because the trial court had prohibited defendant from presenting his insanity defense. Pauley v. State, 113 So. 3d 557 (Miss. 2013).

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

JUDICIAL DECISIONS

Illustrative cases.

State of Mississippi was permitted to impeach defense witnesses, who testified at a sentencing hearing as to defendant's good character, by asking if the witnesses were aware that defendant had pleaded guilty to a felony charge of credit-card fraud. Batiste v. State, 121 So. 3d 808 (Miss. 2013).

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

JUDICIAL DECISIONS

Complete story.
Confusion.
Flight.
Other crimes.
Photographs.
Prejudice not found.
Prior charges.
Prior conviction.
Relationship with Miss. R. Evid. 404(b).
Illustrative cases.

Complete story.

Recording of a 911 call was admissible as the trial judge had discretion to allow the State to tell the complete story of defendant's arrest, and it had the probative value of communicating to the jury the report of the violent situation. Edwards v. State, 124 So. 3d 105 (Miss. Ct. App. 2013).

Confusion.

In an action arising from a motor vehicle accident, exclusion of statements made by the driver to the motorist's husband immediately following the accident was proper; although they were not hearsay because they qualified as admissions by a party-opponent, the driver was not available for cross-examination and liability was not an issue, such that there was no need to confuse the jury. Heflin v. Merrill, — So. 3d —, 2013 Miss. App. LEXIS 688 (Miss. Ct. App. Oct. 15, 2013).

Trial court did not abuse its discretion in excluding testimony regarding an incident defendant had at a gas station on the morning of the shooting at issue because the incident occurred seven hours before the shooting, was unrelated to the shooting, and could mislead the jury. Wansley v. State, 114 So. 3d 793 (Miss. Ct. App. 2013), writ of certiorari denied by 127 So. 3d 1115, 2013 Miss. LEXIS 655 (Miss. 2013).

Flight.

Trial court did not err by giving a flight instruction because there was no independent reason or basis for defendant's flight and the evidence that defendant flipped a car and then fled on foot before law en-

forcement arrived was probative of both whether defendant was purposefully evading pursuing officers and whether, in doing so, defendant was driving recklessly. Because of the probative value of this evidence, neither the evidence, nor the related instruction violated Miss. R. Evid. 403. Williams v. State, 126 So. 3d 85 (Miss. Ct. App. 2013).

Given the record in the case, a circuit court did not abuse its discretion by admitting testimony regarding defendant's out-of-state flight because defendant jumped bond in Mississippi and fled to Florida; when authorities in Mississippi learned of defendant's location through, they contacted authorities in Florida only to learn that defendant had posted a cash bond and been released, and defendant was subsequently arrested again in Texas. Dison v. State, 61 So. 3d 975 (Miss. Ct. App. 2011), writ of certiorari dismissed by 2014 Miss. LEXIS 40 (Miss. Jan. 16, 2014).

Defendant's objection to the admission of evidence that he had jumped bond after being arrested on the ground that it was irrelevant and prejudicial was insufficient to preserve the issue for appeal because defendant's counsel never articulated in his objection that any probative value of the flight evidence was substantially outweighed by its prejudicial effect; while defendant's attorney objected to an officer's testimony as irrelevant, the attorney failed to make any objection regarding Miss. R. Evid. 403 at trial. Dison v. State, 61 So. 3d 975 (Miss. Ct. App. 2011), writ of certiorari dismissed by 2014 Miss. LEXIS 40 (Miss. Jan. 16, 2014).

Other crimes.

Because the probative value of giving the jury a complete account of defendant's arrest outweighed any unfair prejudice, the testimony regarding other crimes was properly admitted. Barber v. State, — So. 2d —, 2013 Miss. App. LEXIS 701 (Miss. Ct. App. Oct. 22, 2013).

State of Mississippi was permitted to impeach defense witnesses, who testified at a sentencing hearing as to defendant's good character, by asking if the witnesses were aware that defendant had pleaded guilty to a felony charge of credit-card fraud. Batiste v. State, 121 So. 3d 808 (Miss. 2013).

Miss. R. Evid. 404(b) exceptions are, indeed, subject to a Miss. R. Evid. 403 balancing test. Pitchford v. State, 45 So. 3d 216 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 2098, 179 L. Ed. 2d 897, 2011 U.S. LEXIS 3058, 79 U.S.L.W. 3592 (U.S. 2011), remanded by 2013 Miss. LEXIS 109 (Miss. Feb. 14, 2013).

Photographs.

Trial court did not err in admitting three photographs depicting the prior abuse of the victim by defendant because the evidence was relevant to show motive, opportunity, intent, and absence of mistake; and the trial court found that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice to defendant, did not confuse the issues, and did not mislead the jury. Clark v. State, 122 So. 3d 129 (Miss. Ct. App. 2013).

Prejudice not found.

Because a witness's testimony about defendant's statement that his father had "turned State on him" was vague and did not implicate defendant's guilt in the murder, the statement was not so unfairly prejudicial that a mistrial was warranted. Thomas v. State, — So. 3d —, 2013 Miss. App. LEXIS 717 (Miss. Ct. App. Oct. 29, 2013).

Because defendant opened the door to evidence regarding his immigration status, he could not complain of prejudice on appeal. Gonzalez v. State, — So. 3d —, 2013 Miss. App. LEXIS 556 (Miss. Ct. App. Sept. 3, 2013).

Prior charges.

Circuit court did not err in excluding evidence of a victim's pending solicitation charges under Miss. R. Evid. 609 and 403 because defendant did not claim that the victim was an aggressor and that he killed the victim in self-defense or in defense or another; therefore, there was no basis for allowing the victim's pending criminal charges admitted into evidence, especially where the crimes did not reflect on the victim's character for truthfulness, dishonesty, violence, or peacefulness. Reith v. State, — So. 3d —, 2013 Miss. App. LEXIS 126 (Miss. Ct. App. Mar. 19, 2013).

Prior conviction.

Evidence of defendant's prior conviction for simple battery was erroneously admitted since: (1) it was not introduced to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but was introduced in part as character evidence; (2) insofar as the evidence was introduced to impeach defendant about whether he was a violent person, defendant's credibility in that regard was not a material issue; (3) it was impermissible for the State to first put defendant's character at issue; and (4) the prejudicial effect of the testimony far outweighed its probative value. Gilmore v. State, 119 So. 3d 278 (Miss. 2013).

Circuit court did not err in admitting defendant's prior drug-sale convictions into evidence because the prior drug convictions were properly admitted under Miss. R. Evid. 404(b) to show defendant's intent to sell; the circuit court conducted a proper Miss. R. Evid. 403 balancing test. Campbell v. State, 118 So. 3d 598 (Miss. Ct. App. 2012), writ of certiorari denied by 117 So. 3d 330, 2013 Miss. LEXIS 377 (Miss. 2013).

Relationship with Miss. R. Evid. 404(b).

In a prosecution for gratification of lust involving two minors, testimony establishing defendant's pattern of molesting prepubescent girls while they were sleeping was properly admitted under Miss. R. Evid. 404(b) because it was relevant to issues of motive, pattern or practice, and absence of mistake, and the trial court found that its probative value outweighed its prejudicial effect. O'Connor v. State, 120 So. 3d 390 (Miss. 2013).

In defendant's trial on charges of molestation and enticement of a child for sexual purposes, the trial court did not abuse its discretion in allowing the testimony of defendant's two nephews, regarding sexual abuse defendant inflicted upon them for a limited purpose, Miss. R. Evid. 404(b), even though the allegations were remote in time and not identical to the current allegations, because the trial court applied the Miss. R. Evid. 403 filter and provided appropriate limiting instructions to the jury about the limited purpose for which it could use the prior-sexual-acts testimony; the State offered the nephews' testimony to show defendant's "pedophilic activity with young and developing males" and his use of intimidation to keep the victims silent. Westbrook v. State, 109 So. 3d 609 (Miss. Ct. App. 2013).

Where a defendant appealed his conviction and sentence for sexual battery and gratification of lust, his prior bad acts could be considered to show, among other things, the absence of mistake or accident. The trial judge complied with the requirements of the Derouen decision by filtering the Miss. R. Evid. 404(b) evidence through Miss. R. Evid. 403 and providing the jury with an appropriate limiting instruction. Cole v. State, 126 So. 3d 880 (Miss. 2013).

Illustrative cases.

Where defendant was convicted of two counts of sexual battery of his stepdaughter, even if the circuit court should have conducted a more thorough analysis on the record of the probative value of defendant's use of a prescription drug usually prescribed for male sexual function problems, the error was harmless, as there was no evidence that defendant was prejudiced by admission of the prescription drug evidence or that its admission misled the jury or led to a confusion of the issues. Corser v. State, — So. 3d —, 2013 Miss. App. LEXIS 834 (Miss. Ct. App. Dec. 3, 2013).

RESEARCH REFERENCES

ALR. Admissibility and Effect of Evidence or Comment on Party's Military Service or Lack Thereof. 24 A.L.R. 6th 747.

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

JUDICIAL DECISIONS

Character of victim.
Complete story.
Drug offenses.
Failure to consider Miss. R. Evid. 403.
Harmless error.
Intent.
Limiting instruction.
Motive.
Negating claim of accident or mistake.
Other crimes.
Prior assault.
Prior violence.
Rebuttal of assertions of good character.
Recorded statement.
Sex offenses.
Illustrative cases.

Character of victim.

Trial court did not abuse its discretion in sustaining the State's objection to defense counsel's line of questioning inferring that the victim had used cocaine on the day of the incident as defendant presented no evidence to show that the victim had used cocaine on the day of the shooting or that cocaine use increased the victim's propensity for violence. Sallie v. State, — So. 3d —, 2013 Miss. App. LEXIS 833 (Miss. Ct. App. Dec. 3, 2013).

Although defendant was authorized to offer specific instances of his murder victim's threats in order to support his claim of self-defense, as he failed to proffer any details of the alleged prior threats and the alleged prior violent instances were not clear, there could be no abuse of discretion with respect to the trial court's evidentiary rulings. Davis v. State, — So. 3d —, 2013 Miss. App. LEXIS 490 (Miss. Ct. App. Aug. 13, 2013), writ of certiorari denied by 2014 Miss. LEXIS 73 (Miss. Jan. 30, 2014).

Circuit court did not abuse its discretion by refusing to admit evidence of a murder victim's alleged propensity towards homosexual conduct because nothing in the record suggested that the victim committed an overt act of aggression against defendant. The evidence indicated that defendant shot the victim in the back of the head during a robbery, while the victim was driving a vehicle. McKenzie v. State, 119 So. 3d 1145 (Miss. Ct. App. 2013).

Because the defense witness's proffered testimony regarding the victim's violent tendencies while under the influence of cocaine and/or alcohol lacked a sufficient evidentiary foundation for admission since the proffered testimony failed to show that defendant believed the victim to be violent when using cocaine or alcohol, the trial court did not err in excluding the defense witness from testifying. Barber v. State, — So. 2d —, 2013 Miss. App. LEXIS 701 (Miss. Ct. App. Oct. 22, 2013).

Circuit court did not err in excluding evidence of a victim's pending solicitation charges under Miss. R. Evid. 609 and 403 because defendant did not claim that the victim was an aggressor and that he killed the victim in self-defense or in defense or another; therefore, there was no basis for allowing the victim's pending criminal charges admitted into evidence, especially where the crimes did not reflect on the victim's character for truthfulness, dishonesty, violence, or peacefulness. Reith v. State, — So. 3d —, 2013 Miss. App. LEXIS 126 (Miss. Ct. App. Mar. 19, 2013).

Complete story.

Recording of a 911 call was admissible as the trial judge had discretion to allow the State to tell the complete story of defendant's arrest, and it had the probative value of communicating to the jury the report of the violent situation. Edwards v. State, 124 So. 3d 105 (Miss. Ct. App. 2013).

Drug offenses.

Circuit court did not err in admitting defendant's prior drug-sale convictions into evidence because the prior drug convictions were properly admitted under Miss. R. Evid. 404(b) to show defendant's intent to sell; the circuit court conducted a proper Miss. R. Evid. 403 balancing test. Campbell v. State, 118 So. 3d 598 (Miss. Ct. App. 2012), writ of certiorari denied by

117 So. 3d 330, 2013 Miss. LEXIS 377 (Miss. 2013).

Failure to consider Miss. R. Evid. 403.

Miss. R. Evid. 404(b) exceptions are, indeed, subject to a Miss. R. Evid. 403 balancing test. Pitchford v. State, 45 So. 3d 216 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 2098, 179 L. Ed. 2d 897, 2011 U.S. LEXIS 3058, 79 U.S.L.W. 3592 (U.S. 2011), remanded by 2013 Miss. LEXIS 109 (Miss. Feb. 14, 2013).

Harmless error.

Improper admission of defendant's prior conviction for simple battery was not harmless because: (1) the issue of innocence or guilt was close; (2) the quantity and character of the evidence favored neither defendant nor the State substantially; (3) the aggravated-assault charge was a grave offense for which defendant was sentenced to 20 years; and (4) the impeachment was reversible error since the State first sought to put defendant's character at issue by asking whether he was a violent person in order to impeach him with his prior conviction. Gilmore v. State, 119 So. 3d 278 (Miss. 2013).

Intent.

In a prosecution for possession of marijuana with intent to distribute, evidence of defendant's prior cocaine distribution conviction was admissible to show his intent to distribute, but evidence of his drug possession convictions was not; however, in light of the overwhelming evidence of his guilt, the error was harmless. McDonald v. State, — So. 3d —, 2013 Miss. App. LEXIS 359 (Miss. Ct. App. June 18, 2013), writ of certiorari denied by 2014 Miss. LEXIS 37 (Miss. Jan. 16, 2014).

Limiting instruction.

Trial court did not abuse its discretion in denying defendant's motion for a mistrial after a State witness mentioned his prior imprisonment in violation of Miss. R. Evid. 404(b) because the witness's brief comment about defendant's imprisonment was not prompted by the State and was immediately addressed by the trial court's limiting instruction that defendant's time in prison had nothing to do with the case; the curative instruction was sufficient to remedy any improper reference to defendant's criminal past and prevent any undue prejudice. Moore v. State, 105 So. 3d 390 (Miss. Ct. App. 2012), writ of certiorari denied by 109 So. 3d 567, 2013 Miss. LEXIS 101 (Miss. 2013).

Motive.

When petitioner admitted that he broke into the victim's house because he needed money to buy drugs, the fact that he actually purchased drugs was admissible as proof of motive. Grayson v. State, 118 So. 3d 118 (Miss. 2013).

Negating claim of accident or mistake.

Where a defendant appealed his conviction and sentence for sexual battery and gratification of lust, his prior bad acts could be considered to show, among other things, the absence of mistake or accident. The trial judge complied with the requirements of the Derouen decision by filtering the Miss. R. Evid. 404(b) evidence through Miss. R. Evid. 403 and providing the jury with an appropriate limiting instruction. Cole v. State, 126 So. 3d 880 (Miss. 2013).

Other crimes.

Because it was defendant's attorney, not the State, that brought up the underlying reason for his arrest — that he allegedly possessed a stolen pistol — defendant could not argue that the gun evidence was improperly introduced. Grindle v. State, — So. 3d —, 2013 Miss. App. LEXIS 535 (Miss. Ct. App. Aug. 27, 2013).

Because an officer's testimony was not admitted to prove that defendant committed other crimes the day of the murder, or that he possessed a propensity toward criminal activity, but, rather, to tell the jury a complete story as to how defendant was taken into the State's custody, where he went after the murder, and his state of mind when he was arrested, the admission of the officer's testimony was not improper. Barber v. State, — So. 2d —, 2013 Miss. App. LEXIS 701 (Miss. Ct. App. Oct. 22, 2013).

Trial court did not abuse its discretion in denying defendant's motion for a mistrial after a State witness mentioned his prior imprisonment in violation of Miss. R. Evid. 404(b) because the State did not

elicit the witness's statements about defendant being in the penitentiary to prove defendant's bad character; in briefly mentioning the penitentiary, the witness did not say what crime defendant had committed. Moore v. State, 105 So. 3d 390 (Miss. Ct. App. 2012), writ of certiorari denied by 109 So. 3d 567, 2013 Miss. LEXIS 101 (Miss. 2013).

Inmate was not entitled to habeas relief on the ground that counsel was ineffective for failing to object to the use of evidence of other crimes the inmate committed because under Miss. R. Evid. 404(b), although evidence of other crimes or misdeeds was not admissible to prove the character of person in order to prove that the person acted in conformity with that character; such proof may be admissible for other purposes, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Miss. R. Evid. 404(b). The State could not paint a rational picture of the events leading up to the shooting or show motive, the stolen drugs, or preparation, theft of the gun, without mentioning those acts, and defendant could not have put on proof of self-defense without mentioning those facts; therefore, counsel had no basis for raising an objection to use of that evidence, and as such his counsel was effective. Chandler v. Marshall County Corr. Ctr., — F. Supp. 2d —, 2010 U.S. Dist. LEXIS 96070 (N.D. Miss. Sept. 14, 2010).

Prior assault.

Evidence of defendant's prior conviction for simple battery was erroneously admitted since: (1) it was not introduced to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but was introduced in part as character evidence; (2) insofar as the evidence was introduced to impeach defendant about whether he was a violent person, defendant's credibility in that regard was not a material issue; (3) it was impermissible for the State to first put defendant's character at issue; and (4) the prejudicial effect of the testimony far outweighed its probative value. Gilmore v. State, 119 So. 3d 278 (Miss. 2013).

Prior violence.

Trial court did not err in admitting three photographs depicting the prior abuse of the victim by defendant because the evidence was relevant to show motive, opportunity, intent, and absence of mistake; and the trial court found that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice to defendant, did not confuse the issues, and did not mislead the jury. Clark v. State, 122 So. 3d 129 (Miss. Ct. App. 2013).

Rebuttal of assertions of good character.

State of Mississippi was permitted to impeach defense witnesses, who testified at a sentencing hearing as to defendant's good character, by asking if the witnesses were aware that defendant had pleaded guilty to a felony charge of credit-card fraud. Batiste v. State, 121 So. 3d 808 (Miss. 2013).

Recorded statement.

Trial court did not abuse its discretion in admitting a recorded statement, even though defendant's motion in limine had been granted under Miss. R. Evid. 404(b), as defense counsel urged the recording's admission without first seeking to have the statement redacted, where she preferred that the recorded statement be played for the jury and characterized the statement as the best evidence of defendant's conversation with a police sergeant. Melton v. State, 118 So. 3d 605 (Miss. Ct. App. 2012), writ of certiorari denied by 117 So. 3d 330, 2013 Miss. LEXIS 375 (Miss. 2013).

Sex offenses.

In defendant's trial on charges of molestation and enticement of a child for sexual purposes, the trial court did not abuse its discretion in allowing the testimony of defendant's two nephews, regarding sexual abuse defendant inflicted upon them for a limited purpose, Miss. R. Evid. 404(b), even though the allegations were remote in time and not identical to the current allegations, because the trial court applied the Miss. R. Evid. 403 filter and provided appropriate limiting instructions to the jury about the limited purpose for which it could use the prior-sexual-acts testimony; the State offered the nephews' testimony to show defen-

dant's "pedophilic activity with young and developing males" and his use of intimidation to keep the victims silent. Westbrook v. State, 109 So. 3d 609 (Miss. Ct. App. 2013).

Illustrative cases.

Trial court did not abuse its discretion when it allowed the victim to testify that she was certain that defendant had touched her inappropriately approximately one year before the event that led to defendant's conviction for touching a child for lustful purposes, because the victim testified that she was certain about what had happened and defendant's attorney's cross examination created a question of fact for the jury to resolve. Gerhold v. State, 127 So. 3d 1116 (Miss. Ct. App. 2013), writ of certiorari denied by 2014 Miss. LEXIS 17 (Miss. Jan. 9, 2014).

In a prosecution for gratification of lust involving two minors, testimony establishing defendant's pattern of molesting prepubescent girls while they were sleeping was properly admitted because it was relevant to issues of motive, pattern or practice, and absence of mistake, and the trial court found its probative value outweighed its prejudicial effect. O'Connor v. State, 120 So. 3d 390 (Miss. 2013).

Circuit court did not err in admitting into evidence a farmer's practices prior to his first termination because the farmer presented evidence regarding his relationship with a corporation prior to his first termination; because the farmer introduced evidence of his business relations with the corporation that occurred before his first termination, he could not complain that the corporation introduced its own evidence from the same time period. Harrison v. Walker, 91 So. 3d 41 (Miss. Ct. App. 2011), writ of certiorari denied en banc by 95 So. 3d 654, 2012 Miss. LEXIS 333 (Miss. 2012).

Circuit court's admission of a farmer's practices prior to his first termination by a corporation did not violate Miss. R. Evid. 404 because evidence of the farmer's poor performance was relevant to the corporation's defense of the farmer's claim that it had entered into the contract with him for the sole purpose of convincing him to refinance his defaulted loan with another lender and wipe the loan from its books; the farmer failed to show that evidence of his prior performance had to be excluded under Miss. R. Evid. 403. Harrison v. Walker, 91 So. 3d 41 (Miss. Ct. App. 2011), writ of certiorari denied en banc by 95 So. 3d 654, 2012 Miss. LEXIS 333 (Miss. 2012).

Trial court did not prevent defendant from presenting his theory of defendant — that during defendant's suicide attempt, the victim tried to wrestle defendant's gun away from him, leading to the accidental discharge that killed the victim — as defendant's proffered testimony relating to his prior suicide attempts was too vague and unspecific to support admission under Miss. R. Evid. 404(b). Specifically, defendant failed to provide evidence as to identifable time periods during which his alleged suicide attempts took place. Adams v. State, 62 So. 3d 432 (Miss. Ct. App. 2011).

Rule 405. Methods of proving character.

JUDICIAL DECISIONS

Specific instances.

Although defendant was authorized to offer specific instances of his murder victim's threats in order to support his claim of self-defense, as he failed to proffer any details of the alleged prior threats and the alleged prior violent instances were not clear, there could be no abuse of discretion with respect to the trial court's evidentiary rulings. Davis v. State, — So. 3d —, 2013 Miss. App. LEXIS 490 (Miss. Ct. App. Aug. 13, 2013), writ of certiorari denied by 2014 Miss. LEXIS 73 (Miss. Jan. 30, 2014).

Rule 407. Subsequent remedial measures.

JUDICIAL DECISIONS

Illustrative cases.

In a negligence suit against a railroad based on a collision between a train and pickup truck, the court properly granted the railroad's motion in limine and excluded, as a subsequent remedial measure, evidence of the railroad's alleged post-accident removal of vegetation nearing the crossing where the collision occurred. Estate of Bloodworth v. Ill. Cent. R.R. Co., — So. 3d —, 2013 Miss. LEXIS 588 (Miss. Nov. 21, 2013).

ARTICLE V. PRIVILEGES

Rule 504. Husband-wife privilege.

JUDICIAL DECISIONS

Illustrative cases.

In a divorce case, the chancellor did not err in allowing the husband's previous wife to testify about the reason for her divorce, as it was relevant to the husband's character and to child custody. She did not testify to any confidential communications under Miss. Code Ann. § 13-1-5 or Miss. R. Evid. 504. McNeese v. McNeese, 119 So. 3d 264 (Miss. 2013).

ARTICLE VI. WITNESSES

Rule 601. General rule of competency.

JUDICIAL DECISIONS

Child witnesses.
Husband and wife.

Child witnesses.

In a case of sexual battery of a victim under the age of 14, the trial court was not required conduct a preliminary interrogation of the four-year-old child to determine competency, and defendant did not show that the trial court erred in allowing her to testify. Graham v. State, 120 So. 3d 1038 (Miss. Ct. App. 2013).

Husband and wife.

Because defense counsel failed to lodge an objection to the husband's testimony against defendant at trial, defendant's claim was barred from review. Sandlin v. State, — So. 2d —, 2013 Miss. LEXIS 538 (Miss. Oct. 10, 2013).

Rule 602. Lack of personal knowledge.

JUDICIAL DECISIONS

Illustrative cases.

Trial court did not abuse its discretion when it allowed the victim to testify that she was certain that defendant had touched her inappropriately approximately one year before the event that led to defendant's conviction for touching a child for lustful purposes, because the victim had personal knowledge about the prior act and testified that she was certain that defendant's penis had been touching her finger in the prior incident. Gerhold v. State, 127 So. 3d 1116 (Miss. Ct. App. 2013), writ of certiorari denied by 2014 Miss. LEXIS 17 (Miss. Jan. 9, 2014).

Trial court did not abuse its discretion by finding that the potential interference, occurring when the State violated this rule by failing to lay a proper foundation before a witness made a statement from which the jury could have inferred that defendant was involved with a gang, did

not warrant a mistrial. Morgan v. State, 117 So. 3d 619 (Miss. 2013).

Testimony of the five victims of automobile burglary was sufficient to support a finding that each possessed personal knowledge of the matter because each of the victims testified that they viewed parking lot surveillance videos prior to trial, testified as to the items taken from their vehicles and provided descriptions as to each of their own vehicles, and testified as to how the surveillance videos related to the actual damages to their vehicles. Bunch v. State, 123 So. 3d 484 (Miss. Ct. App. 2013).

Rule 606. Competency of juror as witness.

JUDICIAL DECISIONS

Applicability.

Post-conviction relief court erred by allowing a juror to be questioned about how alleged extraneous information affected his deliberations. Roach v. State, 116 So. 3d 126 (Miss. 2013).

Rule 607. Who may impeach.

JUDICIAL DECISIONS

Illustrative cases.

State's impeachment of its own witnesses with unsworn prior statements was improper, because the State failed to made the required predicate showing of surprise or unexpected hostility. While the trial court provided a cautionary instruction, the error was not harmless, because the risk that the instruction was not followed was too great and the evidence was not overwhelming. James v. State, 124 So. 3d 693 (Miss. Ct. App. 2013), writ of certiorari denied by 123 So. 3d 450, 2013 Miss. LEXIS 566 (Miss. 2013).

Rule 608. Evidence of character and conduct of witness.

JUDICIAL DECISIONS

In general.
Waiver.
Illustrative cases.

In general.

Where a defendant appealed his conviction and sentence for sexual battery and gratification of lust, he unsuccessfully argued that Miss. R. Evid. 608 and 609 limited all prior-bad-acts evidence to prior convictions. Rule 608 addressed the admissibility of impeachment evidence regarding the character and conduct of a witness, and Rule 609 pertained to the use of a witness's prior convictions for impeachment purposes. Cole v. State, 126 So. 3d 880 (Miss. 2013).

Waiver.

Defendant waived his claim that the State's rebuttal evidence violated this rule since defendant only objected to the evidence based on Miss. Unif. Cir. & Cty. R. 9.04 and hearsay grounds. Pearson v. State, 115 So. 3d 148 (Miss. Ct. App. 2013).

Illustrative cases.

Witness's testimony about defendant's statement that his father had "turned State on him" did not constitute inadmissible character evidence. Thomas v. State, — So. 3d —, 2013 Miss. App. LEXIS 717 (Miss. Ct. App. Oct. 29, 2013).

Investigator's testimony was properly admitted and a recording of a defense witness's conversation with the investigator was properly played for the jury as they evidenced a prior inconsistent statement since the purpose of the evidence was to contradict the witness's prior testimony that she and an investigator did not talk about her trying to get a client to change his story in exchange for the witness getting out of jail, not to attack the witness's character for truthfulness. Pear-

son v. State, 115 So. 3d 148 (Miss. Ct. App. 2013).

Rule 609. Impeachment by evidence of conviction of crime.

JUDICIAL DECISIONS

In general.
Drug offenses.
Harmless error.
Pending indictments.
Previous convictions.
Illustrative cases.

In general.

Where a defendant appealed his conviction and sentence for sexual battery and gratification of lust, he unsuccessfully argued that Miss. R. Evid. 608 and 609 limited all prior-bad-acts evidence to prior convictions. Rule 608 addressed the admissibility of impeachment evidence regarding the character and conduct of a witness, and Rule 609 pertained to the use of a witness's prior convictions for impeachment purposes. Cole v. State, 126 So. 3d 880 (Miss. 2013).

Drug offenses.

In a possession of five or more kilograms of marijuana case, the trial court did not err in admitting evidence of defendant's prior conviction because his testimony and credibility were unquestionably central to the case where the only seriously contested issue was the ownership of the drugs. Gonzalez v. State, — So. 3d —, 2013 Miss. App. LEXIS 556 (Miss. Ct. App. Sept. 3, 2013).

Harmless error.

Improper admission of defendant's prior conviction for simple battery was not harmless because: (1) the issue of innocence or guilt was close; (2) the quantity and character of the evidence favored neither defendant nor the State substantially; (3) the aggravated-assault charge was a grave offense for which defendant was sentenced to 20 years; and (4) the impeachment was reversible error since the State first sought to put defendant's character at issue by asking whether he was a violent person in order to impeach him with his prior conviction. Gilmore v. State, 119 So. 3d 278 (Miss. 2013).

Pending indictments.

Circuit court did not err in excluding evidence of a victim's pending solicitation charges under Miss. R. Evid. 609 and 403 because defendant did not claim that the victim was an aggressor and that he killed the victim in self-defense or in defense or another; therefore, there was no basis for allowing the victim's pending criminal charges admitted into evidence, especially where the crimes did not reflect on the victim's character for truthfulness, dishonesty, violence, or peacefulness. Reith v. State, — So. 3d —, 2013 Miss. App. LEXIS 126 (Miss. Ct. App. Mar. 19, 2013).

Previous convictions.

Trial court did not abuse its discretion in prohibiting cross-examination regarding a witness's 17-year-old conviction because the conviction was over 10 years old, defendant failed to present any evidence that the conviction or the circumstances surrounding it would have offered any probative or impeachment value in the case against him, and there was no evidence that the witness's testimony was motivated by any animus against defendant. Mack v. State, — So. 3d —, 2013 Miss. App. LEXIS 725 (Miss. Ct. App. Oct. 29, 2013).

Trial court did not err in refusing to permit defense counsel to cross-examine the State's key witness about her felony arrests because the charges had not resulted in a conviction; the arrests could not be used to show bias or favorable treatment because there was no correlation between the arrests and the witness's purchases of cocaine from defendant. Cassidy v. State, 110 So. 3d 335 (Miss. Ct. App. 2013).

Illustrative cases.

Defendant's prior conviction for simple battery was not admissible under this rule since simple battery in Louisiana carried a maximum potential punishment of six months' and there was no showing that

the conviction involved dishonesty or a false statement. Gilmore v. State, 119 So. 3d 278 (Miss. 2013).

Rule 611. Mode and order of interrogation and presentation.

JUDICIAL DECISIONS

Control by court.
Leading questions.

Control by court.

Defendant failed to show any abuse of discretion or prejudice resulting from the trial court's decision allowing the prosecution to recall one of its witnesses. Merritt v. State, 127 So. 3d 1150 (Miss. Ct. App. 2013), writ of certiorari denied by 2014 Miss. LEXIS 14 (Miss. Jan. 9, 2014).

Leading questions.

There was no plain error in the State of Mississippi asking leading questions that were necessary to develop the child sexual abuse victim's testimony. Nunnery v. State, 126 So. 3d 105 (Miss. Ct. App. 2013).

Rule 615. Exclusion of witnesses.

JUDICIAL DECISIONS

Harmless error.
Illustrative cases.

Harmless error.

Trial judge erred in refusing to sequester the witnesses at a post-trial hearing held to address defendant's claim that the judge had an improper ex parte communication with a juror, because a court had no discretion to deny a motion for sequestration; however, the error was harmless beyond a reasonable doubt because the evidence of guilt was strong and defendant presented no evidence that he was prejudiced. Avery v. State, 119 So. 3d 317 (Miss. 2013).

Illustrative cases.

Trial court abused its discretion by excluding a defense witness's testimony for no basis other than a violation of the sequestration rule because it should have made a determination as to the prejudicial effect of the violation; White v. State, 127 So. 3d 170 (Miss. 2013).

Exclusion of a defense witness based on the violation by the witness of a sequestration order was an abuse of discretion because there was no evidence the State of Mississippi would have been prejudiced by the testimony of the witness. Clark v. State, 127 So. 3d 292 (Miss. Ct. App. 2013).

Rule 616. Bias of witness.

JUDICIAL DECISIONS

Illustrative cases.

Investigator's testimony was properly admitted and a recording of a defense witness's conversation with the investigator was properly played for the jury as they evidenced the witness's bias since the witness acknowledged that she and defendant were friends, and stated in the recording that she was worried that when defendant found out the witness went against her, defendant would revoke her bond. Pearson v. State, 115 So. 3d 148 (Miss. Ct. App. 2013).

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion testimony by lay witnesses.

JUDICIAL DECISIONS

Opinions.
Police testimony.

Opinions.

Trial court's exclusion of opinion testimony from the defense witnesses that the victim was reaching for a weapon when defendant shot him did not violate defendant's right to present a meaningful defense and did not constitute reversible error because two of the defense witnesses testified that the victim was reaching behind his back during their exchange, from which the jury was free to infer that the victim was going for a gun; defendant testified that the victim was the aggressor and that the victim had previously threatened him with a pistol and even shot at him a little over a week earlier; and defendant testified that he believed the victim was reaching for a gun when he shot him. Love v. State, 121 So. 3d 952 (Miss. Ct. App. 2013).

Police testimony.

Because the sergeant's testimony regarding his personal observations of the scene as to where the bullets appeared to have impacted the ground and where he recovered the shell casings was not based on scientific, technical, or other specialized knowledge, but was helpful to the clear understanding of the testimony or the determination of a fact in issue, the sergeant's testimony required no expert certification, and was admissible non-expert testimony. Barber v. State, — So. 2d —, 2013 Miss. App. LEXIS 701 (Miss. Ct. App. Oct. 22, 2013).

During defendant's trial for possession of a firearm by a convicted felon, the court erred in allowing an officer to testify as a lay witness about external factors that affected whether or not fingerprints could be recovered off of a gun because the officer's testimony was based on the officer's experience as an officer and the training the officer had received in fingerprint analysis. Conner v. State, 45 So. 3d 300 (Miss. Ct. App. Oct. 5, 2010).

Rule 702. Testimony by experts.

JUDICIAL DECISIONS

Calculation of damages.
Medical expert.
Opinions.
Police testimony.
Qualification of expert.
Illustrative cases.

Calculation of damages.

Expert's testimony about appellant's alleged lost profits was properly excluded, as the trial court found that appellant's expert discovery disclosures for lost net profits under Miss. R. Civ. P. 26(b)(4)(A)(i) were not presented in a meaningful way since it appeared the expert was only calculating lost gross profits and not the required lost net profits. Coastal Hardware & Rental Co., LLC v. Certain Underwriters at Lloyds, London, 120 So. 3d 1017 (Miss. Ct. App. 2013).

Where an insured sought lost profits allegedly caused by its insurer's improper denial of coverage, the trial court properly excluded the testimony of the insured's expert, as it appeared he calculated lost gross profits, not lost net profits, and the court found that his testimony was confusing and would not help the jury. Coastal Hardware & Rental Co., LLC v. Certain Underwriters at Lloyds, London, 120 So. 3d 1017 (Miss. Ct. App. 2013).

Medical expert.

In a malpractice case, as the trial testimony of plaintiff's medical expert differed vastly from the opinion stated in his affi-

davit and disclosed in plaintiff's interrogatory responses, defendant surgeon was entitled to a new trial due to the unfair surprise caused by plaintiff's failure to supplement her discovery responses as required by Miss. R. Civ. P. 26(f)(1)(B). Cleveland v. Hamil, — So. 2d —, 2013 Miss. App. LEXIS 112 (Miss. Ct. App. Mar. 12, 2013), affirmed in part and reversed in part by 119 So. 3d 1020, 2013 Miss. LEXIS 404 (Miss. 2013).

In a medical malpractice case, although the trial court properly found that plaintiff's expert was qualified as an expert in thoracic and cardiovascular surgery, as he was not qualified to testify as an expert in gastroenterology—defendant's sub-specialty—he was improperly allowed to opine as to the standard of care applicable to that sub-specialty. Cleveland v. Hamil, — So. 2d —, 2013 Miss. App. LEXIS 112 (Miss. Ct. App. Mar. 12, 2013), affirmed in part and reversed in part by 119 So. 3d 1020, 2013 Miss. LEXIS 404 (Miss. 2013).

While a surgeon was properly qualified as an expert in surgery under Miss. R. Evid. 702, a doctor was entitled to a new trial in a medical malpractice matter as a decedent's wife failed to supplement her discovery responses regarding the substance of the expert's testimony as required by Miss. R. Civ. P. 26 (f)(1)(B) and 26(f)(2)(A) to disclose the substance of the expert's evolving-second-ulcer theory and to provide meaningful information about the decedent's hemoglobin and hematocrit levels as to enable the doctor's counsel to meet the expert's testimony at trial; the doctor's unexercised right to depose the expert did not excuse the wife's unfulfilled duty to supplement and amend her expert's opinion. Cleveland v. Hamil, — So. 3d —, 2012 Miss. App. LEXIS 593 (Miss. Ct. App. Sept. 25, 2012), opinion withdrawn by 2013 Miss. App. LEXIS 94 (Miss. Ct. App. Mar. 12, 2013), substituted opinion at, remanded en banc by 2013 Miss. App. LEXIS 112 (Miss. Ct. App. Mar. 12, 2013).

Opinions.

Trial court did not abuse its discretion in permitting a former wife's expert to testify about the value of a family business that was awarded to the former husband, as it found that the expert used sound methodology and reasonably relied on the evidence available to reach his valuation. Jones v. Jones, — So. 3d —, 2013 Miss. App. LEXIS 218 (Miss. Ct. App. Apr. 30, 2013), writ of certiorari denied by 2014 Miss. LEXIS 57 (Miss. Jan. 23, 2014).

Police testimony.

Because the sergeant's testimony regarding his personal observations of the scene as to where the bullets appeared to have impacted the ground and where he recovered the shell casings was not based on scientific, technical, or other specialized knowledge, but was helpful to the clear understanding of the testimony or the determination of a fact in issue, the sergeant's testimony required no expert certification, and was admissible non-expert testimony. Barber v. State, — So. 2d —, 2013 Miss. App. LEXIS 701 (Miss. Ct. App. Oct. 22, 2013).

Qualification of expert.

Trial court did not abuse its discretion in allowing an expert to testify because she earned a bachelor of arts in biology, she had sixteen years' experience working with bodily fluids in the forensics field, and at the time of trial, she had ten years' experience working as a DNA analyst. She had testified in other courts as a forensic DNA analyst thirty times. Galloway v. State, 122 So. 3d 614 (Miss. 2013).

Court properly allowed an expert's testimony regarding demonstrative evidence because the testimony was reliable based on his extensive professional experience in the field of forensic psychology, and it was clearly relevant to the issues. Bateman v. State, 125 So. 3d 616 (Miss. 2013).

Circuit court did not err in granting a hospital's motion for summary judgment in a negligence action brought by a contractor's employee, who fell when exiting a hospital elevator, because the physician proffered by the employee as an expert admitted that he had no basis for his conclusion that the employee's back complaints appeared to be result of a fall that occurred six years prior to his treatment, other than the history from the employee herself, and as such the physician lacked the requisite factual knowledge to testify

as an expert witness. Buckley v. Singing River Hosp., 99 So. 3d 248 (Miss. Ct. App. Oct. 2, 2012), opinion withdrawn by, substituted opinion at 2013 Miss. App. LEXIS 691 (Miss. Ct. App. Oct. 15, 2013).

Illustrative cases.

Trial judge properly allowed the insureds' expert to testify because he was qualified to give his opinion on the effects that winds would have had on the roof structure and used an accepted method for estimating the cost to repair the structure. Hoover v. United Servs. Auto. Ass'n, 125 So. 3d 636 (Miss. 2013).

Trial court did not err in allowing a construction company owner to testify as an expert witness as his forty years of experience as a residential contractor qualified him to provide expert testimony in that field and his testimony was not outside his area of expertise. Gilmer v. Morris Goodman Builders, Inc., — So. 3d —, 2013 Miss. App. LEXIS 397 (Miss. Ct. App. June 25, 2013).

Expert's opinion did not support appellants' claim that a train crew's view of a crossing was obstructed by vegetation in violation of Miss. Code Ann. § 77-9-254, because his opinion regarding sight-distance deficiencies was based on calculations of a train traveling at 79 mph, while the evidence established that it had been traveling at approximately 49 mph as it approached the crossing. Estate of Bloodworth v. Ill. Cent. R.R. Co., — So. 3d —, 2013 Miss. LEXIS 588 (Miss. Nov. 21, 2013).

In a sexual-battery case, the trial court did not abuse its discretion by accepting the licensed clinical social worker as an expert witness and allowing her to testify that she diagnosed the victim with post-traumatic stress disorder based on information gathered from the victim though an interview because the Daubert factor of being able to test an expert witness's opinion for reliability did not apply. Pickett v. State, — So. 3d —, 2013 Miss. App. LEXIS 761 (Miss. Ct. App. Nov. 12, 2013).

Summary judgment was properly granted on the basis that plaintiff had no basis to establish causation for her negligence claim. The witness designated as plaintiff's expert witness lacked the requisite factual knowledge to testify as an expert as he merely made a conclusory statement, which was not based on anything other than plaintiff's history, that plaintiff's back complaints appeared to be the result of a fall. Buckley v. Singing River Hosp., — So. 3d —, 2013 Miss. App. LEXIS 691 (Miss. Ct. App. Oct. 15, 2013).

Trial court did not err in excluding the opinion of plaintiff's expert witness based on the National Electric Code (NEC) as neither of the expert's reports offered information that showed the NEC's relevance to determining whether the presence of an extension cord across a sidewalk constituted a tripping hazard nor its relevance to determining the applicable standard of care in the case. Howell v. Holiday, — So. 3d —, 2013 Miss. App. LEXIS 134 (Miss. Ct. App. Mar. 26, 2013).

RESEARCH REFERENCES

ALR. Medical Negligence in Extraction of Tooth, Established Through Expert Testimony. 18 A.L.R. 6th 325.

ARTICLE VIII. HEARSAY

Rule 801. Definitions.

JUDICIAL DECISIONS

Admission by party opponent.
— By agent.
Rebuttal of implication raised by opponent.
Statement.
— Conversation.

Truth of matter asserted.

Admission by party opponent.

In an action arising from a motor vehicle accident, exclusion of statements made by the driver to the motorist's husband immediately following the accident was proper; although they were not hearsay because they qualified as admissions by a party-opponent, the driver was not available for cross-examination and liability was not an issue, such that there was no need to confuse the jury. Heflin v. Merrill, — So. 3d —, 2013 Miss. App. LEXIS 688 (Miss. Ct. App. Oct. 15, 2013).

Defendant's statements in his Facebook messages to the murder victim's mother were properly admitted because they were not hearsay under Miss. R. Evid. 801(d)(2)(A), as they were admissions by a party-opponent. Smith v. State, — So. 2d —, 2013 Miss. App. LEXIS 318 (Miss. Ct. App. June 4, 2013).

Pursuant to Miss. R. Evid. 801(d)(2), defendant's testimony from his first trial was properly admitted against him in his second trial as an admission by a party opponent, as that testimony had been voluntary and had not been compelled by the State; that he chose not to testify at his second trial was immaterial. Fulks v. State, 110 So. 3d 764 (Miss. 2013).

In a suit brought against a water park for injuries a patron sustained while on a water slide, the trial court did not err in excluding the testimony of the patron's mother regarding her discussion the day after the accident with an unidentified employee of the water park. The conversation did not qualify as an admission by a party opponent under Miss. R. Evid. 801(d)(2) as the mother could not identify the employee she spoke to and as the employee worked at a concession stand; therefore, it did not appear that the provisions of Rule 801(d)(2) applied since the mother did not prove that the employee was authorized to speak on the subject of where lifeguards should be or should not be on duty. Boyd v. Magic Golf, 52 So. 3d 455 (Miss. Ct. App. 2011).

— By agent.

Deposition of one party's counsel was admissible into evidence because Miss. R. Civ. P. 30(a) permitted either party to take a deposition of any person, Miss. R. Civ. P. 32(a)(3) permitted the admission of the deposition in the absence of the witness, and the counsel was authorized, under Miss. R. Evid. 801(d)(2)(C), to make the statement that co-counsel had informed the counsel the borrowers had accepted a settlement agreement. Williams v. Homecomings Fin. Network, — So. 3d —, 2012 Miss. App. LEXIS 827 (Miss. Ct. App. June 5, 2012).

Rebuttal of implication raised by opponent.

Under Miss. R. Evid. 801(d)(1)(B), an officer's testimony as to what the widow told him was admissible and not hearsay because it served to rebut the implication raised by defendant that the widow's testimony was shaped by her unhappiness with the cost of the work or by her son's reaction to the incident. Cooper v. State, 68 So. 3d 741 (Miss. Ct. App. 2011), writ of certiorari denied by 69 So. 3d 9, 2011 Miss. LEXIS 404 (Miss. 2011).

Statement.

Automatic e-mail notification to a murder victim's mother that defendant had sent the mother a Facebook message was not excludable as hearsay, as there was no "assertion," there was no "declarant," and the statement was not made by a human. Smith v. State, — So. 2d —, 2013 Miss. App. LEXIS 318 (Miss. Ct. App. June 4, 2013).

There was no Confrontation Clause or hearsay violation in an officer's testimony because the officer did not testify that the two people who identified defendant as the shooter were eyewitnesses, the officer did not convey any statements or assertions made by the two anonymous people, either directly or indirectly, and the officer did not reveal the substance of the conversations; the officer stated that defendant became a suspect during the course of her investigation, but it was clear that her investigation involved much more than a conversation with these two people. Thus, it was not apparent that the testimony at issue was hearsay or that the unnamed people could be classified as accusers. Keithley v. State, 111 So. 3d 1202 (Miss. 2013).

— Conversation.

Witness's testimony did not meet the definition of hearsay as, although the witness testified as to decisions that a third party made, the witness never relayed the content of any of the conversations that he had with the third-party company. Gilmer v. Morris Goodman Builders, Inc., — So. 3d —, 2013 Miss. App. LEXIS 397 (Miss. Ct. App. June 25, 2013).

Truth of matter asserted.

In a sexual-battery case, the trial court incorrectly identified the evidence of the testimony of the victim's mother about what her son told her as hearsay because it was not admitted to prove the truth of the matter asserted, but, rather, it was admitted only to show why the victim's mother went to the back room where she stated that she found the victim kneeling on the floor facing defendant, who had his pants and underwear pulled down around his knees. Pickett v. State, — So. 3d —, 2013 Miss. App. LEXIS 761 (Miss. Ct. App. Nov. 12, 2013).

Because a witness's testimony about defendant's statement that his father had "turned State on him" was not against defendant's interest subjecting him to criminal liability, it was not admissible under the hearsay exception of a statement against interest; however, because the statement was not offered for the truth of the matter asserted, it was not hearsay and was admissible. Thomas v. State, — So. 3d —, 2013 Miss. App. LEXIS 717 (Miss. Ct. App. Oct. 29, 2013).

Notations written on photographs were inadmissible hearsay because they were out-of-court written statements offered for the truth of the matter asserted. Estate of Luster v. Mardi Gras Casino Corp., 121 So. 3d 962 (Miss. Ct. App. 2013).

Testimony from a police officer, reciting the statement of a witness to defendant's fatal shooting of a victim, was properly admitted because it was admissible as an out-of-court statement made to the police officer during the course of his investigation and it was not admitted for the truth of the matter asserted therein; moreover, any error was harmless because it mostly benefited defendant and other parts were independently established. Davis v. State, — So. 3d —, 2013 Miss. App. LEXIS 490 (Miss. Ct. App. Aug. 13, 2013), writ of certiorari denied by 2014 Miss. LEXIS 73 (Miss. Jan. 30, 2014).

While the trial court erred by sustaining the State's hearsay objection, the error was not reversible because defendant's substantial rights were not affected by the exclusion of the statement where it was cumulative of defendant's own testimony. Pauley v. State, 113 So. 3d 557 (Miss. 2013).

Rule 802. Hearsay rule.

JUDICIAL DECISIONS

Examples.

Judge did not err in admitting the victim's dying declaration because the officer remained consistent that he believed the victim could understand him and was responding to his questions, and the victim nodded his head "yes" when the officer asked if defendant was the person who shot him. Grindle v. State, — So. 3d —, 2013 Miss. App. LEXIS 535 (Miss. Ct. App. Aug. 27, 2013).

Because a witness's testimony about defendant's statement that his father had "turned State on him" was not against defendant's interest subjecting him to criminal liability, it was not admissible under the hearsay exception of a statement against interest; however, because the statement was not offered for the truth of the matter asserted, it was not hearsay and was admissible. Thomas v. State, — So. 3d —, 2013 Miss. App. LEXIS 717 (Miss. Ct. App. Oct. 29, 2013).

Notations written on photographs were inadmissible hearsay because they were out-of-court written statements offered for the truth of the matter asserted. Estate of Luster v. Mardi Gras Casino Corp., 121 So. 3d 962 (Miss. Ct. App. 2013).

Defendant's statements in his Facebook messages to the murder victim's mother were properly admitted because they were not hearsay under Miss. R. Evid. 801(d)(2)(A), as they were admissions by a

party-opponent. Smith v. State, — So. 2d —, 2013 Miss. App. LEXIS 318 (Miss. Ct. App. June 4, 2013).

Automatic e-mail notification to a murder victim's mother that defendant had sent the mother a Facebook message was not excludable as hearsay, as there was no "assertion," there was no "declarant," and the statement was not made by a human. Smith v. State, — So. 2d —, 2013 Miss. App. LEXIS 318 (Miss. Ct. App. June 4, 2013).

Rule 803. Hearsay exceptions; availability of declarant immaterial.

JUDICIAL DECISIONS

Business records.
Excited utterances.
Medical treatment.
Tender years exception.

Business records.

Admission of an uncertified Radar Unit Certification as a business record, with the arresting officer as the custodian, violated defendant's right to confront the person who performed the radar calibration since the officer did not have knowledge of the contents of the Radar Unit Certification and was unable to testify as to its accuracy. Freeman v. State, 121 So. 3d 888 (Miss. 2013).

Excited utterances.

Hearsay statements of a murder victim's wife were properly admitted as excited utterances, as they were made 10 to 20 minutes after the shooting, and the witness to whom they were made testified that the wife seemed to be in shock and was visibly "shaken up." Barron v. State, — So. 2d —, 2013 Miss. App. LEXIS 314 (Miss. Ct. App. June 4, 2013), writ of certiorari denied by 2014 Miss. LEXIS 61 (Miss. Jan. 23, 2014).

Medical treatment.

Admission of the doctor's testimony that, based on his expertise and education, the victim's behavior was consistent with other children that had been sexually abused was not an abuse of discretion, as it was within the scope of his expert-witness designation. Carpenter v. State, — So. 3d —, 2013 Miss. App. LEXIS 551 (Miss. Ct. App. Sept. 3, 2013).

Because the Mississippi Department of Human Services requested that the doctor interview the child victim to determine whether she had been sexually abused and to determine the best course of treatment for her, including isolating her from her abuser if he was a member of her household, the doctor's interview was admissible as a hearsay exception. Carpenter v. State, — So. 3d —, 2013 Miss. App. LEXIS 551 (Miss. Ct. App. Sept. 3, 2013).

Tender years exception.

While a trial court erred in failing to make an on-the-record determination whether the fourteen-year-old victim, who testified as to the sexual abuse that was committed against the victim, was of tender years and if the tender-years exception was applicable, the trial court's error did not warrant reversal because the weight of the evidence against defendant was sufficient to outweigh the harm done by allowing admission of the evidence. Nunnery v. State, 126 So. 3d 105 (Miss. Ct. App. 2013).

In a sexual-battery case, the trial court did not err in allowing an employee of the Mississippi Department of Human Services to testify about the victim's statements to her because the victim was of tender years when she made the statement, as she was 12 years old; the victim's statements to the employee had substantial indicia of reliability; and the victim testified at trial. Pickett v. State, — So. 3d —, 2013 Miss. App. LEXIS 761 (Miss. Ct. App. Nov. 12, 2013).

Because the circuit court clearly made an affirmative on-the-record finding of reliability concerning the victim's statements, the admission of the victim's recorded interview into evidence was not an abuse of discretion. Carpenter v. State, — So. 3d —, 2013 Miss. App. LEXIS 551 (Miss. Ct. App. Sept. 3, 2013).

Trial court did not abuse its discretion in admitting the victim's statements under the tender-years exception to the

hearsay rule, Miss. R. Evid. 803(25) because the trial court noted that because of the victim's young age, as well as the spontaneity and consistency of her statements,, her statements were reliable. Brown v. State, 119 So. 3d 1079 (Miss. Ct. App. 2013).

Rule 804. Hearsay exceptions; declarant unavailable.

JUDICIAL DECISIONS

Circumstantial guarantees of trustworthiness.
Dying declarations.
Former testimony.
Physical illness.
Statement.
Unavailability.
— Not found.

Circumstantial guarantees of trustworthiness.

The murder victim's statements to bank employees and to the victim's parent were admissible because (1) defendant had sufficient notice of the testimony; (2) the statements had circumstantial guarantees of trustworthiness; and (3) the statements were probative and material. Batiste v. State, 121 So. 3d 808 (Miss. 2013).

Dying declarations.

Judge did not err in admitting the victim's dying declaration because the officer remained consistent that he believed the victim could understand him and was responding to his questions, and the victim nodded his head "yes" when the officer asked if defendant was the person who shot him. Grindle v. State, — So. 3d —, 2013 Miss. App. LEXIS 535 (Miss. Ct. App. Aug. 27, 2013).

Former testimony.

Appellant claimed that in his wrongful conviction and imprisonment suit under Miss. Code Ann. § 11-44-7(1), the trial court erred in admitting his co-defendant's prior testimony, because appellant's counsel in the criminal trial was ineffective in cross-examining that witness. This claim failed because appellant, in his criminal appeal based on ineffective assistance, never objected to his attorney's cross-examination of this witness. Hymes v. State, 121 So. 3d 938 (Miss. Ct. App. 2013).

Physical illness.

Circuit judge did not err by deciding to declare a police detective unavailable as a witness, because of the detective's serious health issues, and to admit the detective's videotaped deposition testimony. McKenzie v. State, 119 So. 3d 1145 (Miss. Ct. App. 2013).

Statement.

Because a witness's testimony about defendant's statement that his father had "turned State on him" was not against defendant's interest subjecting him to criminal liability, it was not admissible under the hearsay exception of a statement against interest; however, because the statement was not offered for the truth of the matter asserted, it was not hearsay and was admissible. Thomas v. State, — So. 3d —, 2013 Miss. App. LEXIS 717 (Miss. Ct. App. Oct. 29, 2013).

Unavailability.

Trial court committed no error when it held that the State established a witness's unavailability under Miss. R. Evid. 804(a)(5) because the State made reasonable and diligent efforts to locate the witness; the State had its criminal investigator testify on his efforts to locate the witness. Thomas v. State, — So. 3d —, 2012 Miss. App. LEXIS 605 (Miss. Ct. App. Oct. 2, 2012), affirmed in part and remanded in part by 126 So. 3d 877, 2013 Miss. LEXIS 528 (Miss. 2013).

— Not found.

Notations written on photographs were inadmissible hearsay because they were out-of-court written statements offered for the truth of the matter asserted. Moreover, the declarant of the written statements could have been available to testify. Estate of Luster v. Mardi Gras Casino Corp., 121 So. 3d 962 (Miss. Ct. App. 2013).

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Rule 901. Requirement of authentication or identification.

JUDICIAL DECISIONS

Photographs.
Videotape.
Illustrative cases.

Photographs.

Trial court properly did not enter photographs of a casino floor into evidence in a slip and fall personal injury case because they were not properly authenticated, as there was no evidence or testimony as to who took the photographs, when the photographs were taken, or where the photographs were taken. Estate of Luster v. Mardi Gras Casino Corp., 121 So. 3d 962 (Miss. Ct. App. 2013).

Videotape.

State of Mississippi adequately provided a proper chain of custody for the admission of parking lot surveillance videos into evidence because the State provided the testimony of a retail store assistant manager and a hospital information technology officer, who both acted as the custodians of their employers' surveillance-video equipment, that the copies of the surveillance footage accurately depicted the contents of the original surveillance footage. Bunch v. State, 123 So. 3d 484 (Miss. Ct. App. 2013).

Illustrative cases.

Admission of an uncertified Radar Unit Certification as a business record, with the arresting officer as the custodian, violated defendant's right to confront the person who performed the radar calibration since the officer did not have knowledge of the contents of the Radar Unit Certification and was unable to testify as to its accuracy. Freeman v. State, 121 So. 3d 888 (Miss. 2013).

Murder victim's mother sufficiently authenticated printouts of Facebook messages by her testimony that the documents were the Facebook messages between her and defendant. Smith v. State, — So. 2d —, 2013 Miss. App. LEXIS 318 (Miss. Ct. App. June 4, 2013).

Rule 902. Self-authentication.

JUDICIAL DECISIONS

Certified copies.

Trial court did not err in admitting Intoxilyzer results because the calibration certificate at issue met the requirements of the Mississippi Rules of Evidence where it contained both the Mississippi state seal and the calibrating officer's attesting signature. Drabicki v. City of Ridgeland, — So. 3d —, 2013 Miss. App. LEXIS 404 (Miss. Ct. App. June 25, 2013).

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1006. Summaries.

JUDICIAL DECISIONS

Inclusion.

Chancellor did not abuse the chancellor's discretion by allowing a summary of one spouse's bank records into evidence in a divorce proceeding. Gardner v. Gardner, — So. 3d —, 2013 Miss. App. LEXIS 624 (Miss. Ct. App. Sept. 24, 2013).

ARTICLE XI. MISCELLANEOUS RULES

Rule 1101. Applicability of rules.

JUDICIAL DECISIONS

Applicability.

As a trial court, on remand, failed to give defendant a meaningful opportunity to present evidence of prejudice with respect to the Barker factors for his speedy trial claim, arising from a forfeiture action initiated by the county, the remand order was not complied with and the evidence could not be properly weighed. One 1970 Mercury Cougar v. Tunica County, 115 So. 3d 792 (Miss. 2013).

MISSISSIPPI RULES OF APPELLATE PROCEDURE

APPLICABILITY OF RULES

Rule 2. Penalties for noncompliance with rules; suspension of rules.

JUDICIAL DECISIONS

Suspension of rules.
Timeliness of appeal.

Suspension of rules.

Supreme Court of Mississippi would not consider defendant's Miss. R. App. P. 17 petition for a writ of certiorari because defendant's motion for rehearing, filed more than two weeks past the deadline, was untimely under Miss. R. App. P. 40, and defendant did not argue that there was good cause to suspend the rule under Miss. R. App. P. 2(c). McCalpin v. State, — So. 3d —, 2013 Miss. LEXIS 56 (Miss. Feb. 14, 2013).

Though appellant failed to file its appeal with 14 days of the appellate court's decision as required by Miss. R. App. P. 40(a), because the matter was of significant importance in setting precedent, the appellate court exercised its authority under Miss. R. App. P. 2(c) to recall the mandate and issue a modified opinion on rehearing. Sweet Valley Missionary Baptist Church v. Alfa Ins. Corp., 124 So. 3d 683 (Miss. Ct. App. 2013), affirmed by, remanded by 124 So. 3d 643, 2013 Miss. LEXIS 574 (Miss. 2013).

Timeliness of appeal.

Reversal was not required in defendant's driving under the influence because of the fact that the city's appellee brief was struck by a circuit court judge for being untimely. The circuit court was not required to automatically reverse defendant's conviction if it could affirm the conviction with confidence, which it did. Carlson v. City of Ridgeland, — So. 2d —, 2013 Miss. App. LEXIS 474 (Miss. Ct. App. Aug. 6, 2013).

State supreme court declined to address a bar applicant's previous appeal because that appeal was noticed 14 months after the final judgment in that case, which was outside the 30 days allowed for filing an appeal, and any attempt to appeal that order was subject to mandatory dismissal pursuant to Miss. R. App. P. 4(a) and 2(a)(1). Griffin v. Miss. Bd. of Bar Admissions, 113 So. 3d 1257 (Miss. 2013).

Appellate court exercised its discretion under Miss. R. App. P. 2(c) to allow an inmate's late appeal of the denial of his motion to reconsider the dismissal of his post-conviction relief petition where the notice of appeal was received only one day late, and the documents could have been delivered to prison authorities within the 30-day time frame of Miss. R. App. P. 4(a). Campbell v. State, 126 So. 3d 61 (Miss. Ct. App. 2013), writ of certiorari denied by 125 So. 3d 658, 2013 Miss. LEXIS 609 (Miss. 2013).

Rule 3. Appeal as of right — How taken.

JUDICIAL DECISIONS

Error preserved.
Improper notice of appeal.

Error preserved.

Where a former husband appealed the trial court's award of attorney's fees to the former wife, it was not necessary for him to request a reconsideration in order to preserve the matter for appeal. Speights v. Speights, 126 So. 3d 76 (Miss. Ct. App. 2013).

Improper notice of appeal.

Because the chancellor's order generally denied a husband's post-trial motions, which included the issues raised on appeal, and in light of the Fletcher standard, the court would consider the merits of each of the husband's issues on appeal, even though the motions were not designated specifically in his pro se notice of appeal. McNeese v. McNeese, 119 So. 3d 264 (Miss. 2013).

Rule 4. Appeal as of right — When taken.

JUDICIAL DECISIONS

Cross-appeals.
Extensions of time.
Time for appeal.
Illustrative cases.

Cross-appeals.

Appellate court lacked jurisdiction over a father's cross-appeal, seeking to fully emancipate his son, because the father missed his time to file a cross-appeal, Miss. R. App. P. 4(c), and the chancellor failed to rule on the father's request that his time to file a cross-appeal be reopened, Rule 4(g). Finch v. Finch, — So. 3d —, 2012 Miss. App. LEXIS 610 (Miss. Ct. App. Oct. 2, 2012), affirmed in part and reversed in part by, remanded by 2014 Miss. LEXIS 33 (Miss. Jan. 16, 2014).

Extensions of time.

Wife's appeal of a divorce decree was timely as the deadline for the appeal was extended since the last day of the appeal period ran on Confederate Memorial Day, which was a legal holiday. Wilson v. Wilson, 115 So. 3d 144 (Miss. Ct. App. 2013).

Time for appeal.

While a timely motion under Miss. Unif. Cir. & Cty. R. 10.05. for judgment of acquittal notwithstanding the verdict of a jury tolled the running of the time to file a notice of appeal until the entry of the order denying such motion, defendant's untimely motion did not toll the time limit to appeal under Miss. R. App. P. 4. Conwill v. State, — So. 3d —, 2013 Miss. App. LEXIS 778 (Miss. Ct. App. Nov. 19, 2013).

State supreme court declined to address a bar applicant's previous appeal because that appeal was noticed 14 months after the final judgment in that case, which was outside the 30 days allowed for filing an appeal, and any attempt to appeal that order was subject to mandatory dismissal pursuant to Miss. R. App. P. 4(a) and 2(a)(1). Griffin v. Miss. Bd. of Bar Admissions, 113 So. 3d 1257 (Miss. 2013).

As a trial court did not abuse its discretion in holding that the dismissal of a particular defendant was a final, appealable judgment under Miss. R. Civ. P. 54(b), an appeal was untimely under Miss. R. App. P. 4(a) where it was taken from a later order that dismissed the remaining defendants. Cook v. Wallot, — So. 3d —, 2013 Miss. App. LEXIS 245 (Miss. Ct. App. May 7, 2013).

Illustrative cases.

Appellate court exercised its discretion under Miss. R. App. P. 2(c) to allow an inmate's late appeal of the denial of his motion to reconsider the dismissal of his post-conviction relief petition where the notice of appeal was received only one day late, and the documents could have been delivered to prison authorities within the 30-day time frame of Miss. R. App. P. 4(a). Campbell v. State, 126 So. 3d 61 (Miss. Ct. App. 2013), writ of certiorari denied by 125 So. 3d 658, 2013 Miss. LEXIS 609 (Miss. 2013).

RESEARCH REFERENCES

ALR. Propriety and Sufficiency of Electronic Filing of Notice of Appeal in State Actions. 70 A.L.R.6th 661.

Rule 5. Interlocutory appeal by permission.

JUDICIAL DECISIONS

No appellate jurisdiction.

Appellate court lacked jurisdiction to consider the merits of a case because a chancellor's order—that the purported heirs' claims for establishment as children of their putative deceased father were barred by Miss. Code § 91-1-15—was not certified, did not include all parties, was amended after the appeal was filed, and the purported heirs neither sought nor received permission to proceed with an interlocutory appeal. Young v. Pollion (In re Gardner), 126 So. 3d 95 (Miss. Ct. App. 2013).

Owner's appeal was dismissed for lack of jurisdiction because his personal injury complaint alleged multiple claims against three parties, the circuit court's grant of summary judgment to an inspector lacked a final judgment certification, and there was no evidence the Mississippi Supreme Court granted permission to appeal an interlocutory order. Clausell v. Bourque, 122 So. 3d 825 (Miss. Ct. App. 2013).

Chancellor's order that found father in contempt for failing to pay child support but did not determine the amount of the arrearage or the amount of future child support the father would be obligated to pay was not a final order and as the mother failed to obtain permission to appeal, the appellate court lacked jurisdiction to consider the mother's appeal. Raven v. Boyd, 111 So. 3d 690 (Miss. Ct. App. 2013).

Rule 8. Stay or injunction pending appeal.

JUDICIAL DECISIONS

Bond on money judgment.

Plaintiff does not waive the right to sue a circuit clerk for negligently approving a supersedeas bond if the plaintiff did not challenge the circuit clerk's approval of that bond. Newton County v. State ex rel. Dukes, — So. 2d —, 2013 Miss. App. LEXIS 332 (Miss. Ct. App. June 4, 2013), writ of certiorari denied by 2014 Miss. LEXIS 8 (Miss. Jan. 9, 2014).

Trial court erred in enforcing a deficient supersedeas bond against a city to satisfy the judgments against codefendants because it could not be considered a surety since it was already principally liable for a portion of the judgment. City of Belzoni v. Johnson, 121 So. 3d 216 (Miss. 2013).

Rule 15. Mandamus to require trial court decision.

JUDICIAL DECISIONS

In general.

An appellate court, as a court of error correction, can only find error in the decisions a lower court has made — an appellate court cannot find error in the failure to make a decision. If a lower court has not yet made a decision, the only assistance the appellate court may provide is mandamus — an order by the Supreme Court of Mississippi to make a ruling, but the appellate court cannot reverse the absence of a ruling through an appeal. James v. James, — So. 3d —, 2013 Miss. App. LEXIS 805 (Miss. Ct. App. Nov. 26, 2013).

Rule 17. Review in the supreme court following decision by the Court of Appeals.

JUDICIAL DECISIONS

Discretionary review.

Supreme Court of Mississippi would not consider defendant's Miss. R. App. P. 17 petition for a writ of certiorari because defendant's motion for rehearing, filed more than two weeks past the deadline, was untimely under Miss. R. App. P. 40, and defendant did not argue that there was good cause to suspend the rule under Miss. R. App. P. 2(c). McCalpin v. State, — So. 3d —, 2013 Miss. LEXIS 56 (Miss. Feb. 14, 2013).

CERTIFIED QUESTIONS FROM FEDERAL COURTS

Rule 22. Applications for post-conviction collateral relief in criminal cases.

JUDICIAL DECISIONS

Ineffective assistance of counsel.

Defendant's ineffective-assistance-of-counsel arguments were improper for direct appeal because the record lacked any evidence one way or the other regarding whether counsel's choices of not making an opening statement, not proposing any jury instructions, and not calling a witness at trial might have been permissible trial strategy. Thomas v. State, — So. 3d —, 2013 Miss. App. LEXIS 717 (Miss. Ct. App. Oct. 29, 2013).

Because the reviewing court lacked the benefit of any evidence defendant would have presented in support of his insanity defense, which was relevant to the prejudice prong of the Strickland test, defendant's ineffective-assistance-of-counsel claim was better left for post-conviction proceedings. Pauley v. State, 113 So. 3d 557 (Miss. 2013).

Alleged deficiencies of counsel were not based on facts fully apparent from the record, and were more appropriate for post-conviction review. Keithley v. State, 111 So. 3d 1202 (Miss. 2013).

Defendant's claim of ineffective assistance of counsel was not appropriate for consideration on direct appeal because deciding the issue on the record before the appellate court would require speculation as to counsel's motives in examining a witness. Henry v. State, 124 So. 3d 87 (Miss. Ct. App. 2013), writ of certiorari denied by 123 So. 3d 450, 2013 Miss. LEXIS 559 (Miss. 2013).

GENERAL PROVISIONS

Rule 26. Computation and extension of time.

JUDICIAL DECISIONS

Holidays.

Wife's appeal of a divorce decree was timely as the deadline for the appeal was extended since the last day of the appeal period ran on Confederate Memorial Day, which was a legal holiday. Wilson v. Wilson, 115 So. 3d 144 (Miss. Ct. App. 2013).

Rule 28. Briefs.

JUDICIAL DECISIONS

Failure to cite authority.
Failure to preserve error.
No arguable issues.

Failure to cite authority.

Although the unemployment benefits claimant filed his brief pro se, because pro se parties were held to the same rules of procedure and substantive law as represented parties, his failure to cite to a single authority in support of his arguments on appeal acted as a procedural bar to his claims, and they would not be addressed on appeal. Jones v. Miss. Dep't of Empl. Sec., — So. 3d —, 2013 Miss. App. LEXIS 458 (Miss. Ct. App. July 30, 2013).

Appellants' mere mention of case law authority without any development of their appellate argument was insufficient to support their appeal of a declaratory judgment that allowed appellee to reenter and retake possession of a mobile home park, particularly in light of the fact that the case cited did not in fact support the position that appellants apparently wanted to take in their appeal. Stathos v. Lee County Rentals, LLC, 119 So. 3d 377 (Miss. Ct. App. 2013).

Failure to preserve error.

Appellant, by only raising and arguing three of the appellant's thirteen trial court claims on appeal, waived and abandoned the other ten claims on appeal. Ravenstein v. Cmty. Trust Bank, — So. 2d —, 2013 Miss. App. LEXIS 476 (Miss. Ct. App. Aug. 6, 2013).

No arguable issues.

Appellate counsel's brief, which stated that she had diligently searched the procedural and factual history of defendant's burglary prosecution but was unable to find any arguable issues, and which also outlined the specific issues she reviewed the record about, satisfied the requirements of this rule as well as the requirements for a Lindsey brief filing. McCarley v. State, 123 So. 3d 478 (Miss. Ct. App. 2013).

Rule 31. Filing and service of briefs.

JUDICIAL DECISIONS

Timely filing.

City's failure to file an appellate brief did not require that defendant's conviction be reversed because the record was not complicated or large in volume, and the basis of the conviction was unmistakable. Drabicki v. City of Ridgeland, — So. 3d —, 2013 Miss. App. LEXIS 404 (Miss. Ct. App. June 25, 2013).

Rule 40. Motion for rehearing.

JUDICIAL DECISIONS

Suspension of rules.
Timeliness.

Suspension of rules.

Though appellant failed to file its appeal with 14 days of the appellate court's decision as required by Miss. R. App. P. 40(a), because the matter was of significant importance in setting precedent, the appellate court exercised its authority under Miss. R. App. P. 2(c) to recall the mandate and issue a modified opinion on rehearing. Sweet Valley Missionary Baptist Church v. Alfa Ins. Corp., 124 So. 3d 683 (Miss. Ct. App. 2013), affirmed by, remanded by 124 So. 3d 643, 2013 Miss. LEXIS 574 (Miss. 2013).

Timeliness.

Supreme Court of Mississippi would not consider defendant's Miss. R. App. P. 17 petition for a writ of certiorari because defendant's motion for rehearing, filed more than two weeks past the deadline,

was untimely under Miss. R. App. P. 40, and defendant did not argue that there was good cause to suspend the rule under Miss. R. App. P. 2(c). McCalpin v. State, — So. 3d —, 2013 Miss. LEXIS 56 (Miss. Feb. 14, 2013).

Rule 41. Issuance of mandates; stay of mandate.

JUDICIAL DECISIONS

Suspension of rules.

Though appellant failed to file its appeal with 14 days of the appellate court's decision as required by Miss. R. App. P. 40(a), because the matter was of significant importance in setting precedent, the appellate court exercised its authority under Miss. R. App. P. 2(c) to recall the mandate and issue a modified opinion on rehearing. Sweet Valley Missionary Baptist Church v. Alfa Ins. Corp., 124 So. 3d 683 (Miss. Ct. App. 2013), affirmed by, remanded by 124 So. 3d 643, 2013 Miss. LEXIS 574 (Miss. 2013).

UNIFORM RULES OF CIRCUIT AND COUNTY COURT PRACTICE

Adopted Effective May 1, 1995

Rule 1.03. Sanctions.

JUDICIAL DECISIONS

Dismissal.

Dismissal with prejudice of all of plaintiff's claims against a competitor was proper due to sufficient evidence that plaintiff knew that there were improper ex parte communications with a judge on its behalf in order to advance its interest in the lawsuit, arising from former employees' involvement with the competitor. Eaton Corp. v. Frisby, — So. 3d —, 2013 Miss. LEXIS 596 (Miss. Nov. 21, 2013).

Rule 1.05A. Assignment of cases.

JUDICIAL DECISIONS

Sanctions.

Creditor was entitled to a nondischargeable judgment under 11 U.S.C.S. § 523(a)(6) because a state court sanctions award in favor of the creditor for the debtor's violation of Miss. Unif. Cir. & Cty. R. 1.05A, which was entitled to preclusive effect, established that the debtor acted willfully and maliciously to injure the creditor. State Farm Mut. Auto. Ins. Co. v. Gatlin (In re Gatlin), — Bankr. —, 2013 Bankr. LEXIS 2108 (Bankr. S.D. Miss. May 22, 2013).

Rule 1.10. Earwigging prohibited.

JUDICIAL DECISIONS

Dismissal.

Dismissal with prejudice of all of plaintiff's claims against a competitor was proper due to sufficient evidence that plaintiff knew that there were improper ex parte communications with a judge on its behalf in order to advance its interest in the lawsuit, arising from former employees' involvement with the competitor. Eaton Corp. v. Frisby, — So. 3d —, 2013 Miss. LEXIS 596 (Miss. Nov. 21, 2013).

Rule 1.13. Withdrawal of counsel from a case.

When an attorney makes an appearance for any party in a case, that attorney will not be allowed to withdraw as attorney for the party without the permission of the court. The attorney making the request shall give notice to his/her client and to all attorneys in the cause and certify the same to the court in writing. The court shall not permit withdrawal without prior notice to his/her client and all attorneys of record.

Rule 1.15. Motions for recusal of judges.

JUDICIAL DECISIONS

Failure to recuse.

Judge was publicly reprimanded, fined, and assessed costs of the proceeding because the judge, among other things, mentioned to counsel in chambers, but did not make a disclosure on the record, that his father might have been tested for asbestosis, failed to disclose the history of his parent's asbestosis claims, and the settlement between the judge's father and one of the parties, and failed to rule on counsel's motion to recuse made after the conflict was discovered. Miss. Comm'n on Judicial Performance v. Bowen, 123 So. 3d 381 (Miss. 2013).

Rule 3.05. Voir dire.

JUDICIAL DECISIONS

Individual voir dire.
Particular verdict.

Individual voir dire.

Because the circuit court allowed defense counsel to ask the members of the venire if they had formed an opinion based on the information that they had heard, and because none indicated that they had formed an opinion based on the information that they had read or heard, there was no need to engage in individual voir dire. Johnson v. State, — So. 3d —, 2013 Miss. App. LEXIS 859 (Miss. Ct. App. Dec. 10, 2013).

Particular verdict.

Because the trial judge's questions during voir dire about whether the jury would be able to convict defendant of aggravated assault even if no gun was admitted into evidence did not cross the clear line by asking venire members to pledge a specific verdict if the State proved a particular set of facts, no plain, clear, or obvious error was committed; in fact, no error was committed because the trial judge was well within his broad discretion when asking the venire about any preconceived notions regarding what evidence was required to convict defendant. Evans v. State, — So. 3d —, 2013 Miss. App. LEXIS 860 (Miss. Ct. App. Dec. 10, 2013).

Rule 3.10. Jury deliberations and verdict.

JUDICIAL DECISIONS

Videotape.

Trial court did not err by allowing a jury to view a videotape of an out-of-court recorded interview of the alleged victim as evidence, similar to live testimony by witnesses, and by then prohibiting this particular evidence from being taken into the jury room for deliberations. Furthermore, defendant suffered no prejudice as a result of the court's decision not to allow this evidence into the jury room because there was sufficient evidence to support the jury's verdict apart from the videotape. Ellis v. State, — So. 3d —, 2013 Miss. App. LEXIS 718 (Miss. Ct. App. Oct. 29, 2013).

Rule 3.12. Mistrials.

JUDICIAL DECISIONS

Jury deliberations.

Because the juror stated that she did not know the person who alleged that she had a preexisting relationship with a member of the victim's family, denied the allegations that she had visited the victim's grandmother after his death and had discussed the case with the victim's family prior to serving as a juror, and declared that she had been and would continue to be fair and impartial, the circuit court did not err in allowing the juror to return to deliberations after finding that the allegations of her misconduct were unsubstantiated. Johnson v. State, — So. 3d —, 2013 Miss. App. LEXIS 859 (Miss. Ct. App. Dec. 10, 2013).

Rule 4.03. Motion practice.

JUDICIAL DECISIONS

Timeliness.

Where the trial court dismissed appellant's medical-malpractice claim with prejudice for failure to prosecute, its finding of delay and contumacious conduct was supported by evidence that appellant allowed the case to languish for over a year, repeatedly failed to submit timely and sufficient responses to discovery, submitted untimely discovery requests and response to the motion to dismiss, and did not disclose the basis for her claim until over two years after the responses were requested. Cornelius v. Benefield, — So. 3d —, 2013 Miss. App. LEXIS 558 (Miss. Ct. App. Sept. 3, 2013).

Rule 4.04. Discovery deadlines and practice.

JUDICIAL DECISIONS

In general.
Failure to comply.

In general.

Expert's testimony as to matters contained in his supplemental report was properly excluded as the expert's late submission of his expert report violated Miss. Unif. Cir. & Cty. R. 4.04(A). Howell v. Holiday, — So. 3d —, 2013 Miss. App. LEXIS 134 (Miss. Ct. App. Mar. 26, 2013).

Failure to comply.

Appellants' medical-malpractice suit was properly dismissed on summary judgment because they failed to produce expert testimony to support their claim; the fact that no trial date had been set in the case did not mean that the 60-day deadline for designating an expert never expired. Johnson v. Pace, 122 So. 3d 66 (Miss. 2013).

Trial court properly granted summary judgment to defendant on the basis that plaintiff failed to give defendant advance notice of the opinion testimony of plaintiff's expert so as to allow defendant to meaningfully cross-examine the expert at his deposition given that plaintiff's failure to designate the expert as an expert witness clearly constituted a discovery violation, and plaintiff had not provided any reason why she was unable to formally designate the expert as an expert witness and comply with the scheduling order. Buckley v. Singing River Hosp., — So. 3d —, 2013 Miss. App. LEXIS 691 (Miss. Ct. App. Oct. 15, 2013).

Where the trial court dismissed appellant's medical-malpractice claim with prejudice for failure to prosecute, its finding of delay and contumacious conduct was supported by evidence that appellant allowed the case to languish for over a year, repeatedly failed to submit timely and sufficient responses to discovery, submitted untimely discovery requests and response to the motion to dismiss, and did not disclose the basis for her claim until over two years after the responses were

requested. Cornelius v. Benefield, — So. 3d —, 2013 Miss. App. LEXIS 558 (Miss. Ct. App. Sept. 3, 2013).

Rule 6.03. Initial appearance.

JUDICIAL DECISIONS

Prejudice.
Illustrative cases.

Prejudice.

While the record did not indicate why defendant did not appear before a judge for six days after her arrest, even if the delay was improper, and her allegation that she could not use the phone was true, because she offered no proof of how that prejudiced her trial defense, the delay between her arrest and initial appearance did not mandate reversal of her convictions. McClendon v. State, 124 So. 3d 709 (Miss. Ct. App. 2013).

Illustrative cases.

Delay in defendant's initial appearance that violated this rule did not require the suppression of evidence since defendant was Mirandized before each interview and was aware of his rights. Lawrence v. State, 124 So. 3d 91 (Miss. Ct. App. 2013), writ of certiorari denied by 123 So. 3d 450, 2013 Miss. LEXIS 555 (Miss. 2013).

Rule 7.06. Indictments.

JUDICIAL DECISIONS

Date of offense.
Sentence enhancement.
Sufficient description of offense.

Date of offense.

Indictment was not fatally flawed because it fully notified defendant of the charges against him and was legally sufficient; even though the dates varied slightly between the indictment and the victim's testimony, the rules clearly stated that failure to include the specific date in the indictment was not enough to render an indictment legally insufficient, and a specific date in a case of sexual abuse of a child was not required. Jenkins v. State, — So. 3d —, 2013 Miss. LEXIS 569 (Miss. Oct. 31, 2013).

Inmate waived his claim that his indictment was defective because it was not signed by the grand jury foreman or the circuit clerk and was not dated when the inmate entered his best interests plea; further, the indictment met all the requirements of Miss. Unif. Cir. & Cty. R. 7.06. Sims v. State, — So. 2d —, 2013 Miss. App. LEXIS 102 (Miss. Ct. App. Mar. 5, 2013).

In a case where defendant was convicted of statutory rape and of sexual battery of a child, although the indictment listed a four-year time span in which the offenses occurred, because defense counsel requested and was granted jury instructions limiting that time span to 15-months during which defendant was in contact with the children, the 15-month time span in which the offenses allegedly occurred was not unreasonably large for defendant to be on notice as to the crimes charged and was not unreasonably large so as to prevent defendant from defending himself. Hines v. State, 126 So. 3d 985 (Miss. Ct. App. 2013).

Sentence enhancement.

Because no authority holds that the indictment must make reference to the enhancement statute, and the statute specifying what the indictment must contain does not require such inclusion, and because the counts in the indictment alleged that defendant committed an aggravated assault by shooting the victim in the back with a firearm and that he was a convicted felon in unlawful possession of a firearm, there was no unfair surprise regarding defendant's sentence enhancement, and the enhanced portion of his sentence was legal. Sallie v. State, — So.

3d —, 2013 Miss. App. LEXIS 833 (Miss. Ct. App. Dec. 3, 2013).

Sufficient description of offense.

Defendant was adequately informed by the indictment of the nature of the felony escape charge against defendant and the supporting facts because the indictment stated that defendant willfully, unlawfully, and feloniously escaped by force from the custody of a county sheriff's department, pursuant to lawful process or arrest, in violation of Miss. Code Ann. § 97-9-49. Jackson v. State, 121 So. 3d 313 (Miss. Ct. App. 2013).

Rule 7.09. Amendment of indictments.

JUDICIAL DECISIONS

In general.
Habitual offenders.
Service.
Unfair surprise.

In general.

Adequate notice of a post-conviction amendment is achieved through formal pleadings that include the specific amendment to be offered and are filed sufficiently in advance of trial to ensure that a defendant will have a fair opportunity to present a defense and will not be unfairly surprised. Boyd v. State, 113 So. 3d 1252 (Miss. 2013).

No prejudice resulted to the defense because the jury instructions given by the trial court properly related the robbery charge to the testimony and evidence presented to the jury for their deliberations. Moreover, the record failed to reflect any evidence of variation between the elements and the factual proof in support of each element of the robbery charge. Faust v. State, 113 So. 3d 614 (Miss. Ct. App. 2013).

Habitual offenders.

Trial court did not err in amending the indictment after jury selection had been completed to charge defendant as a habitual offender as the amendment was permitted and as defendant was not unfairly surprised. Ferguson v. State, — So. 3d —, 2013 Miss. App. LEXIS 423 (Miss. Ct. App. July 16, 2013).

Amendment of an indictment to charge defendant as a habitual offender was not improper as it was made prior to defendant's conviction, it affected only defendant's sentencing, not substance of crime he was charged with, and defendant's ability to prepare a defense to the enhancement was not impaired. Lamb v. State, 124 So. 3d 84 (Miss. Ct. App. 2013), writ of certiorari denied by 123 So. 3d 450, 2013 Miss. LEXIS 557 (Miss. 2013).

Service.

Defendant was properly sentenced as a nonviolent habitual offender because, while he had not served a year in prison for one of the felony-convictions in the indictment, he was served with a copy of the State's motion to amend the indictment, which resulted in his indicted status being changed from non-habitual offender to habitual offender, defendant had adequate notice and was not unfairly surprised by the State's use of his prior convictions. Curry v. State, — So. 3d —, 2013 Miss. App. LEXIS 681 (Miss. Ct. App. Oct. 15, 2013).

Unfair surprise.

Defendant did not receive timely notice that the State would seek a post-conviction amendment to the indictment to reflect subsequent-offender status and the amendment constituted unfair surprise as the verbal notice given during pretrial proceedings on the morning of trial did not sufficiently inform defendant what his sentence might be if he were found to be a subsequent offender, and the State sought to double up to 80 years due to the subsequent offender status, but defendant was sentenced to a total of 120 years; Boyd v. State, 113 So. 3d 1252 (Miss. 2013).

Rule 8.04. Entry of guilty pleas, plea bargaining, withdrawal of guilty pleas.

JUDICIAL DECISIONS

Factual basis.
Voluntariness.

Factual basis.

There was not a sufficient factual basis to support defendant's guilty plea to driving under the influence (DUI) manslaughter and DUI mayhem, under Miss. Code Ann. § 63-11-30, because there was no factual basis that defendant had been driving in the county where the accident occurred, that defendant was impaired by controlled substances while defendant was driving, and that defendant performed a negligent act that caused one child's death and another child's serious bodily injury in an auto accident. Porter v. State, 126 So. 3d 68 (Miss. Ct. App. 2013).

Voluntariness.

Absence of a guilty-plea petition did not automatically invalidate defendant's guilty plea because there was no rule that required a defendant to sign a guilty-plea petition before the trial court could accept his or her guilty plea; the record did not contain a guilty-plea transcript, and defendant failed to submit any affidavits to support his contentions. Whetstone v. State, 109 So. 3d 616 (Miss. Ct. App. 2013).

Circuit court did not abuse its discretion when it denied defendant's motion to withdraw his guilty plea because defendant voluntarily entered his guilty plea; a review of the transcript from the plea hearing demonstrated that the circuit court thoroughly questioned defendant to ensure that his guilty plea was freely and voluntarily given. Jackson v. State, 122 So. 3d 1220 (Miss. Ct. App. 2013), writ of certiorari denied by 123 So. 3d 450, 2013 Miss. LEXIS 531 (Miss. 2013).

Appellant entered a voluntary Alford plea because his indictment laid out the elements of the sexual-exploitation charge against him; therefore, appellant had sufficient notice of the elements of that charge. Argol v. State, — So. 2d —, 2013 Miss. App. LEXIS 143 (Miss. Ct. App. Apr. 2, 2013), writ of certiorari denied by 2014 Miss. LEXIS 59 (Miss. Jan. 23, 2014), writ of certiorari denied by 2014 Miss. LEXIS 60 (Miss. Jan. 23, 2014).

Appellant entered a voluntary Alford plea because even though the circuit court did not recite the elements of the crimes during the plea hearing, the prosecutor made an on-the-record statement properly identifying the elements; the prosecutor's statements made during the plea hearing sufficiently informed appellant of the elements of the charges. Argol v. State, — So. 2d —, 2013 Miss. App. LEXIS 143 (Miss. Ct. App. Apr. 2, 2013), writ of certiorari denied by 2014 Miss. LEXIS 59 (Miss. Jan. 23, 2014), writ of certiorari denied by 2014 Miss. LEXIS 60 (Miss. Jan. 23, 2014).

Rule 8.05. Pro se defendants.

JUDICIAL DECISIONS

Compliance with rule.
Right to self representation.

Compliance with rule.

Circuit court did not err in finding that defendant waived his right to the assistance of counsel under Miss. Unif. Cir. & Cty. R. 8.05 where the record was clear that even after the circuit court apprised defendant of his rights, he refused to participate in his trial. Defendant purposefully intended to use his absolute right to counsel to avoid going to trial, a course of action that the Alabama Supreme Court specifically proscribed; additionally, defendant's waiver was knowing and voluntary since he was fully aware of the rights that he would be jeopardizing by proceeding without counsel. Lewis v. State, — So. 3d —, 2013 Miss. App. LEXIS 129 (Miss. Ct. App. Mar. 19, 2013), writ of certiorari denied by 2014 Miss. LEXIS 94 (Miss. Feb. 6, 2014).

Right to self representation.

No on-the-record examination was necessary to determine whether defendant knowingly and voluntarily waived the right to counsel because he received substantive assistance from his counsel in the form of hybrid representation; even if no hybrid representation were found, the requirements of the rule that defendant knowingly and voluntarily waive the right to counsel were met as the trial court made it sufficiently clear to defendant the requirements and perils of self-representation. Wash v. State, — So. 3d — 2013 Miss. App. LEXIS 763 (Miss. Ct. App. Nov. 12, 2013).

Rule 9.03. Severance.

JUDICIAL DECISIONS

Severance not granted.

Trial court did not err in denying defendant's motion for severance because she did not show that she suffered any prejudice from the joint trial as the actions of her co-conspirators would be relevant and admissible even if she were tried alone, and she could not point to any evidence the jury would not have received if she had been tried separately. Hayes v. State, — So. 3d —, 2013 Miss. App. LEXIS 744 (Miss. Ct. App. Nov. 5, 2013).

Trial court did not err in denying defendant's motion for severance because any prejudice defendant might have suffered from the joint trial did not rise to the level of reversible error as a severance would have changed almost nothing in the evidence that would have been presented to the jury in his trial, which included testimony that defendant was armed in advance, the testimony of three witnesses that they saw him firing a shotgun from behind a tree, and a spent shotgun shell found near the tree corroborating the witnesses' testimony. Hayes v. State, — So. 3d —, 2013 Miss. App. LEXIS 744 (Miss. Ct. App. Nov. 5, 2013).

Rule 9.04. Discovery.

JUDICIAL DECISIONS

Evidence.
Sanctions.
Violation of rule harmless error.
Waiver.
Witnesses.

Evidence.

Even if the State failed to submit an expert report comparing spent shell casings found at the crime scene to those from a test fire done at the crime lab in discovery, because defense counsel was allowed to review the report, and the judge offered a continuance, the trial court did not err in allowing the State to introduce the report. Barber v. State, — So. 2d —, 2013 Miss. App. LEXIS 701 (Miss. Ct. App. Oct. 22, 2013).

Sanctions.

Trial court did not abuse its discretion in denying defendant an opportunity to interview the victim or to inspect her diary because no discovery violation occurred when neither the defense nor the State was aware of the diary prior to the victim's testimony, and the existence of the diary itself was in doubt Jenkins v. State, — So. 3d —, 2013 Miss. LEXIS 569 (Miss. Oct. 31, 2013).

Trial court abused its discretion and committed reversible error by excluding the testimony of a defense witness because the proper remedy would have been to have granted a continuance, if requested by the State of Mississippi, rather than to have excluded the witness. Clark v. State, 127 So. 3d 292 (Miss. Ct. App. 2013).

Under Miss. Unif. Cir. & Cty. R. 9.04(I)(2) the trial court was not obligated to exclude a witness's written statement, grant a continuance, or grant a mistrial because after defendant's objection, the trial court properly granted the defense

an opportunity to review the statement, and the defense did not seek a continuance or a mistrial; there was no evidence of prosecutorial misconduct in withholding the statement, and no evidence that the State was concealing the fact that it would call the witness. Thomas v. State, — So. 3d —, 2012 Miss. App. LEXIS 605 (Miss. Ct. App. Oct. 2, 2012), affirmed in part and remanded in part by 126 So. 3d 877, 2013 Miss. LEXIS 528 (Miss. 2013).

Violation of rule harmless error.

Although the trial court's exclusion of the police report was improper, the error is harmless because defendant testified to the contents of the report. Matthews v. City of Madison, — So. 3d —, 2013 Miss. App. LEXIS 611 (Miss. Ct. App. Sept. 17, 2013).

Waiver.

Defendant waived his claim that the State's rebuttal evidence violated Miss. R. Evid. 608 since defendant only objected to the evidence based on this rule and hearsay grounds. Pearson v. State, 115 So. 3d 148 (Miss. Ct. App. 2013).

Witnesses.

Since the State sufficiently identified the testifying witnesses through discovery documents provided to the defense, there was no violation of this rule. Shaw v. State, — So. 3d —, 2013 Miss. App. LEXIS 662 (Miss. Ct. App. Oct. 8, 2013).

Playing a recording of a defense witness speaking with an investigator did not violate this rule since the statement was made by a defense witness and was submitted during rebuttal; further, defendant only requested his statements, not statements made by the witness. Pearson v. State, 115 So. 3d 148 (Miss. Ct. App. 2013).

Defendant's motion for a continuance was properly denied as the State did not violate the discovery requirements of Miss. Unif. Cir. & Cty. R. 9.04 when defendant's co-defendant changed his plea to guilty and agreed to testify for the State on the second day of trial. Defendant was not ambushed by this, and he had ample opportunity to confront the co-defendant's testimony. Sanders v. State, 38 So. 3d 639 (Miss. Ct. App. 2010).

Rule 9.06. Competence to stand trial.

JUDICIAL DECISIONS

Hearing.
No finding of incompetency to stand trial.

Hearing.

Doctor's report finding that appellant was competent to go to trial or enter a guilty plea, along with defense counsel's confirmation of appellant's competency at the plea hearing, was sufficient to establish that he was competent to enter his guilty pleas. Montalto v. State, 119 So. 3d 1087 (Miss. Ct. App. 2013), writ of certiorari dismissed by 127 So. 3d 1115, 2013 Miss. LEXIS 635 (Miss. 2013).

As neither appellant nor his attorney expressed concern about the lack of a competency hearing when appellant entered his guilty pleas, and the trial court made an implicit, if not explicit, finding that appellant was competent to enter a plea, it did not err in failing to hold a separate competency hearing under Miss. Unif. Cir. & Cty. R. 9.06. Montalto v. State, 119 So. 3d 1087 (Miss. Ct. App. 2013), writ of certiorari dismissed by 127 So. 3d 1115, 2013 Miss. LEXIS 635 (Miss. 2013).

No finding of incompetency to stand trial.

Trial judge was able to observe defendant's behavior, including his ability to consult with counsel, to understand the proceedings, and to question witnesses and conduct cross-examination, and did not err in finding that he was not incompetent at the time of trial. Wash v. State, — So. 3d — 2013 Miss. App. LEXIS 763 (Miss. Ct. App. Nov. 12, 2013).

Rule 10.01. Jury selection.

JUDICIAL DECISIONS

Noncapital offenses.

Defendant was only entitled under Miss. Unif. Cir. & Cty. R. 10.01 to six peremptory challenges as provided for in the trial court because, while defendant faced life imprisonment as a consequence of defendant's status as a habitual offender, defendant's conviction involved the noncapital offense of automobile burglary. Bunch v. State, 123 So. 3d 484 (Miss. Ct. App. 2013).

Rule 10.03. Open and closing statement.

JUDICIAL DECISIONS

Defense theories.

There was no error in granting the State's ore tenus motion that defense counsel be prohibited from mentioning defense theories during voir dire and opening statements because although defendant testified during the trial, the circuit court had no way of guaranteeing that the testimony would occur; by allowing the theories to be introduced prior to defendant's testimony, the jury would have been privy to a defense theory that could or could not have been supported by the facts. McTiller v. State, 113 So. 3d 1284 (Miss. Ct. App. 2013).

Rule 10.05. New trials.

JUDICIAL DECISIONS

Motion improperly denied.

Trial court did not abuse its discretion in denying defendant's motion for a new trial based upon juror misconduct because a juror testified that she did not have any of information sought during voir dire prior to trial or during voir dire. Vaughn v. State, 111 So. 3d 1289 (Miss. Ct. App. 2013).

While a timely motion under Miss. Unif. Cir. & Cty. R. 10.05. for judgment of acquittal notwithstanding the verdict of a jury tolled the running of the time to file a notice of appeal until the entry of the order denying such motion, defendant's untimely motion did not toll the time limit to appeal under Miss. R. App. P. 4. Conwill v. State, — So. 3d —, 2013 Miss. App. LEXIS 778 (Miss. Ct. App. Nov. 19, 2013).

Rule 11.03. Enhancement of punishment.

JUDICIAL DECISIONS

In general.

Even though defendant's indictment did not refer to the date of judgment for either of defendant's prior convictions, the habitual-offender portion of the indictment was sufficient to put defendant on notice of the prior convictions used to charge defendant as a habitual offender. The indictment listed the previous convictions; the court that adjudicated each conviction; the date of each conviction, which was the date that defendant pleaded guilty to those crimes; the imposed sentences for each conviction; and the cause numbers for each conviction. Ford v. State, — So. 3d —, 2013 Miss. App. LEXIS 836 (Miss. Ct. App. Dec. 3, 2013).

Rule 12.02. Appeals from justice or municipal court.

JUDICIAL DECISIONS

Bonds.

Defendant's bond was insufficient as both a cost bond and appearance bond even though the circuit clerk accepted it as both because Miss. Unif. Cir. & Cty. R. 12.02(A)(1) made it clear that it was the appellant's filing of the written notice and posting of both bonds that perfected the appeal, not the acceptance by the circuit clerk. Ray v. State, 124 So. 3d 80 (Miss. Ct. App. 2013), writ of certiorari denied by 123 So. 3d 450, 2013 Miss. LEXIS 558 (Miss. 2013).

County and circuit courts did not err in dismissing defendant's appeal for failure to satisfy the separate appearance-bond requirement because defendant's failure to file an appearance bond was not a mere technicality but a failure to comply with a substantive requirement of the rule necessary to stay the judgment from the justice court and vest the county court with appellate jurisdiction; further, defendant did not ask the county court for permission to amend his "appeal bond." Ray v. State, 124 So. 3d 80 (Miss. Ct. App. 2013), writ of certiorari denied by 123 So. 3d 450, 2013 Miss. LEXIS 558 (Miss. 2013).

It is not just an appellant's filing of written notice of appeal and posting a bond (or cash deposit) that perfects the appeal, it is his or her filing of the written notice and posting two separate bonds (or cash deposits) that perfects the appeal. Ray v. State, 124 So. 3d 80 (Miss. Ct. App. 2013), writ of certiorari denied by 123 So. 3d 450, 2013 Miss. LEXIS 558 (Miss. 2013).

County and circuit courts did not err in dismissing defendant's appeal for failure to satisfy the separate appearance-bond requirement because defendant's bond was not enough to stay his justice-court conviction and perfect his appeal; defendant filed a cost bond, but under Miss. Unif. Cir. & Cty. R. 12.02, he also had to secure his appearance through a separate appearance bond, which he did not do. Ray v. State, 124 So. 3d 80 (Miss. Ct. App. 2013), writ of certiorari denied by 123 So. 3d 450, 2013 Miss. LEXIS 558 (Miss. 2013).

Index to Uniform Rules of Circuit and County Court Practice

UNIFORM CHANCERY COURT RULES

6.00 RULES CONCERNING PROBATE MATTERS

Rule 6.12. Petitions for allowance of attorney's fees.

JUDICIAL DECISIONS

Fee found appropriate.

Although an attorney's written filings failed to fully comply with the Mississippi Uniform Chancery Court Rules, no error was found because all of the required information was presented to the chancery court during the hearing, the attorney testified to the nature and extent of the service rendered and expense incurred, the attorney's experience, the novelty of the legal questions involved, and the reasonableness of the fee. In re Wilhite, 121 So. 3d 301 (Miss. Ct. App. 2013).

7.00 RULES CONCERNING VACATION MATTERS

Rule 7.03. Removal of disability.

JUDICIAL DECISIONS

In general.

Plaintiff's tort action based on events that occurred when he was 19 years old was timely as it was filed less than three years after his 21st birthday; removal of the disability of minority did not arise automatically upon the occurrence of specified events except for reaching the age of 21, and thus, plaintiff's emancipation did not trigger the automatic removal of disability of minority. Baker v. RR Brink Locking Sys., 721 F.3d 716 (5th Cir. 2013).

8.00 RULES CONCERNING DIVORCE

Rule 8.05. Financial statement required.

JUDICIAL DECISIONS

Change in circumstances not shown.
Failure to disclose.
Judicial discretion proper.

Change in circumstances not shown.

For purposes of awarding alimony, the wife's income and expenses in her financial statement under this rule had not been updated since 2006 and were not accurate as her monthly expenses had been overstated, and her income had not been adjusted for a job change that occurred in 2008. Archie v. Archie, 126 So. 3d 937 (Miss. Ct. App. 2013).

Failure to disclose.

In calculating child support, the trial court erred in arbitrarily determining a husband's monthly income to exclusion of the undisputed evidence he provided, due to his failure to comply with Miss. Unif. Ch. Ct. R. 8.05, because the remedy for his violation was to hold him in contempt, not to disregard the credible evidence he provided. Collins v. Collins, 112 So. 3d 428 (Miss. 2013).

Chancellor erred in failing to find, before awarding separate maintenance to a wife, that no significant marital miscon-

duct by the wife materially contributed negatively to the separation, and the wife also failed to establish the husband refused to support her after the separation, due to the significant omissions in the wife's Miss. Unif. Ch. Ct. R. 8.05 financial statement. Jackson v. Jackson, 114 So. 3d 768 (Miss. Ct. App. 2013).

Wife's failure to disclose a retirement account under Miss. Unif. Ch. Ct. R. 8.05 did not merit reopening a divorce case. The husband did not explain why he did not know about or could not have discovered the account, the amount of which was insignificant. McNeese v. McNeese, 119 So. 3d 264 (Miss. 2013).

Chancery court did not abuse its discretion in finding a wife committed a fraud upon the court by filing a substantially false Miss. Unif. Ch. Ct. R. 8.05 financial statement because the wife was aware of additional debts and bank accounts and failed to disclose them to the chancery court during its attempt to make an equitable divorce decree; therefore, the six-month time limitation of Miss. R. Civ. P. 60(b) did not apply, and the chancery court was within its discretion in vacating the original divorce judgment and altering the terms of that judgment. Finch v. Finch, — So. 3d —, 2012 Miss. App. LEXIS 610 (Miss. Ct. App. Oct. 2, 2012), affirmed in part and reversed in part by, remanded by 2014 Miss. LEXIS 33 (Miss. Jan. 16, 2014).

Judicial discretion proper.

While a chancellor erred in including rentals in a husband's income, the error was harmless as the chancellor discussed and made specific findings for child support under Miss. Code Ann. §§ 43-19-101, 43-19-103 and properly relied on the parties' Miss. Unif. Ch. Ct. R. 8.05 disclosure forms and other documentary evidence. Collins v. Collins, 112 So. 3d 460 (Miss. Ct. App. 2012), affirmed in part and reversed in part by, remanded by 112 So. 3d 428, 2013 Miss. LEXIS 285 (Miss. 2013).

MISSISSIPPI RULES OF PROFESSIONAL CONDUCT

CLIENT-LAWYER RELATIONSHIP

Rule 1.7. Conflict of interest: general rule.

JUDICIAL DECISIONS

Applicability.

Pursuant to Miss. R. Prof. Conduct 1.7(a) and 1.10(a), there was no cause to disqualify a law firm that represented defendants, although plaintiff had met with two of the firm's attorneys in his capacity as a national commander of a military order, as the attorneys did not have any relationship with plaintiff in his individual capacity; further, information discussed with the attorneys was not confidential. Cook v. Wallot, — So. 3d —, 2013 Miss. App. LEXIS 245 (Miss. Ct. App. May 7, 2013).

Rule 1.9. Conflict of interest: former client.

JUDICIAL DECISIONS

Applicability.

Counsel was not ineffective based on a failure to withdraw due to a conflict of interest because the rule of professional conduct regarding conflicts of interest due to the attorney's representation of a former client, who was a witness at defendant's trial, was inapplicable as defendant's attorney did not obtain any privileged information from the former client; the former client's grand-larceny charge was entirely unrelated to defendant's murder charge; and defendant was aware of the brief former representation and agreed to waive any conflict. Thomas v. State, — So. 3d —, 2013 Miss. App. LEXIS 717 (Miss. Ct. App. Oct. 29, 2013).

Rule 1.10. Imputed disqualification: general rule.

JUDICIAL DECISIONS

Conflict.

Pursuant to Miss. R. Prof. Conduct 1.7(a) and 1.10(a), there was no cause to disqualify a law firm that represented defendants, although plaintiff had met with two of the firm's attorneys in his capacity as a national commander of a military order, as the attorneys did not have any relationship with plaintiff in his individual capacity; further, information discussed with the attorneys was not confidential. Cook v. Wallot, — So. 3d —, 2013 Miss. App. LEXIS 245 (Miss. Ct. App. May 7, 2013).

ADVOCATE

Rule 3.7. Lawyer as witness.

JUDICIAL DECISIONS

Illustrative cases.

Pursuant to Miss. R. Prof. Conduct 3.7(a) and 1.10(a), there was no cause to disqualify a law firm that represented defendants, although plaintiff had met with two of the firm's attorneys in his capacity as a national commander of a military order, as even if the attorneys were used as witnesses in the case, the information discussed with them was not confidential. Cook v. Wallot, — So. 3d —, 2013 Miss. App. LEXIS 245 (Miss. Ct. App. May 7, 2013).

RULES OF DISCIPLINE FOR THE MISSISSIPPI STATE BAR

PART ONE. RULES OF DISCIPLINE

Rule 6. Suspensions and disbarments based on other proceedings.

JUDICIAL DECISIONS

In general.

Mississippi Bar's request to disbar an attorney was denied because disbarring the attorney approximately 24 years after his conviction and 13 years after the Mississippi Bar restored him from inactive to active status failed to serve the purposes of the Rules of Discipline, would certainly prejudice him, and would be a harsh and ineffective sanction. Miss. Bar v. Collins, 119 So. 3d 1039 (Miss. 2013).

RULES GOVERNING ADMISSION TO THE MISSISSIPPI BAR

RULE IX. EXAMINATION

Section 9. Passing grade.

JUDICIAL DECISIONS

Passing grade.

Bar applicant's contention that Miss. R. Admis. St. Bar 9, § 9 required a minimum Multistate Bar Exam score to pass the bar was without merit because the rule clearly provided that an examinee had to receive a combined score of 132 points on the entire exam to receive a passing grade. Griffin v. Miss. Bd. of Bar Admissions, 113 So. 3d 1257 (Miss. 2013).

CODE OF JUDICIAL CONDUCT

Canon 1. A judge shall uphold the integrity and independence of the judiciary.

JUDICIAL DECISIONS

Miscellaneous misconduct.

Judge was publicly reprimanded, fined, and assessed costs of the proceeding because the judge, among other things, mentioned to counsel in chambers, but did not make a disclosure on the record, that his father might have been tested for asbestosis, failed to disclose the history of his parent's asbestosis claims, and the settlement between the judge's father and one of the parties, and failed to rule on counsel's motion to recuse made after the conflict was discovered. Miss. Comm'n on Judicial Performance v. Bowen, 123 So. 3d 381 (Miss. 2013).

Judge was publicly reprimanded, suspended, and fined because he committed willful misconduct and conduct prejudicial to the administration of justice when he recused himself from cases and reinserted himself and took further action in the cases and abused the contempt power; however, there was no evidence of any premeditation, that the judge's conduct was done to satisfy any personal desires, or that the judge personally gained from his actions. Miss. Comm'n on Judicial Performance v. Skinner, 119 So. 3d 294 (Miss. 2013).

Judge committed willful misconduct and conduct prejudicial to the administration of justice, bringing the judicial office into disrepute, because the judge recused himself from cases, and then, with full knowledge that he was recused, reinserted himself and took further action in the cases; the judge abused the contempt power by issuing arrest warrants for indirect criminal contempt that led to parents being held without bond for seventy-two hours without notice or a hearing. Miss. Comm'n on Judicial Performance v. Skinner, 119 So. 3d 294 (Miss. 2013).

As a judge violated Miss. Code Jud. Conduct Canons 1, 2(A), 2(B), 3(B)(2), 3(B)(4), and 3(C)(1), and Miss. Const. art, VI, § 177A by attempting to use his office to advance the private interests of his tenant and himself as landlord, and by being impatient and discourteous and abusing his contempt power when arguing with a probation officer, and he had a pattern of prior misconduct, he was publicly reprimanded and fined. Miss. Comm'n on Judicial Performance v. Fowlkes, 121 So. 3d 904 (Miss. 2013).

Canon 2. A judge shall avoid impropriety and the appearance of impropriety in all activities.

JUDICIAL DECISIONS

Miscellaneous misconduct.

Judge was publicly reprimanded, fined, and assessed costs of the proceeding because the judge, among other things, mentioned to counsel in chambers, but did not make a disclosure on the record, that his father might have been tested for asbestosis, failed to disclose the history of his parent's asbestosis claims, and the settlement between the judge's father and one of the parties, and failed to rule on counsel's motion to recuse made after the conflict was discovered. Miss. Comm'n on Judicial Performance v. Bowen, 123 So. 3d 381 (Miss. 2013).

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Canon 3. A judge shall perform the duties of judicial office impartially and diligently.

JUDICIAL DECISIONS

Disqualification.
Miscellaneous misconduct.
Recusal.

Disqualification.

Fact that the judge who presided over defendant's trial for the sale of methamphetamine might, while in his role as a county district attorney, have prosecuted defendant for other crimes, was not in and of itself sufficient to overcome the presumption of the judge's impartiality such that he should have recused himself from the methamphetamine trial. West v. State, — So. 2d —, 2013 Miss. App. LEXIS 309 (Miss. Ct. App. June 4, 2013), writ of certiorari denied by 2014 Miss. LEXIS 90 (Miss. Feb. 6, 2014).

As a trial judge's remarks from a pretrial hearing, which the jury did not hear, did not produce a reasonable doubt as to his impartiality, he did not commit manifest error by denying defendant's motion to recuse himself Fulks v. State, 110 So. 3d 764 (Miss. 2013).

Miscellaneous misconduct.

Judge committed willful misconduct and conduct prejudicial to the administration of justice, bringing the judicial office into disrepute, because the judge recused himself from cases, and then, with full knowledge that he was recused, reinserted himself and took further action in the cases; the judge abused the contempt power by issuing arrest warrants for indirect criminal contempt that led to parents being held without bond for seventy-two hours without notice or a hearing. Miss. Comm'n on Judicial Performance v. Skinner, 119 So. 3d 294 (Miss. 2013).

Judge was publicly reprimanded, suspended, and fined because he committed willful misconduct and conduct prejudicial to the administration of justice when he recused himself from cases and reinserted himself and took further action in the cases and abused the contempt power; however, there was no evidence of any premeditation, that the judge's conduct was done to satisfy any personal desires, or that the judge personally gained from his actions. Miss. Comm'n on Judicial Performance v. Skinner, 119 So. 3d 294 (Miss. 2013).

As a judge violated Miss. Code Jud. Conduct Canons 1, 2(A), 2(B), 3(B)(2), 3(B)(4), and 3(C)(1), and Miss. Const. art, VI, § 177A by attempting to use his office to advance the private interests of his tenant and himself as landlord, and by being impatient and discourteous and abusing his contempt power when arguing with a probation officer, and he had a pattern of prior misconduct, he was pub-

licly reprimanded and fined. Miss. Comm'n on Judicial Performance v. Fowlkes, 121 So. 3d 904 (Miss. 2013).

Recusal.

Chancellor in a property boundary line dispute was not required to have sua sponte made a recusal for having earlier prepared a deed which was entered into evidence or for having knowledge of the area where the chancellor lived. Mize v. Westbrook Constr. Co. of Oxford, LLC, — So. 3d —, 2013 Miss. App. LEXIS 432 (Miss. Ct. App. July 16, 2013).

Defendant's argument that the trial judge should have recused himself from the second trial because he presided over the original trial was without merit because defendant failed to present any evidence of prejudice, bias, or abuse of discretion on the part of the trial judge because the only evidence of bias cited by defendant was the trial judge's failure to apply the Weathersby rule, but the Weathersby rule was not applicable to the case. Kiker v. State, — So. 3d —, 2013 Miss. App. LEXIS 425 (Miss. Ct. App. July 16, 2013), writ of certiorari denied by 2014 Miss. LEXIS 56 (Miss. Jan. 23, 2014).

Inmate's claim that the trial judge was biased failed as there was no basis for the trial judge to recuse himself under Miss. Code Jud. Conduct Canon 3E(1)(a) merely because he had presided over a related civil suit against the City alleging the City's and its police officers' negligence in pursuing the inmate; there was no evidence of personal bias or prejudice against the inmate, and there were no disputed evidentiary facts since the inmate entered a best interests plea. Sims v. State, — So. 2d —, 2013 Miss. App. LEXIS 102 (Miss. Ct. App. Mar. 5, 2013).

Judge was publicly reprimanded, fined, and assessed costs of the proceeding because the judge, among other things, mentioned to counsel in chambers, but did not make a disclosure on the record, that his father might have been tested for asbestosis, failed to disclose the history of his parent's asbestosis claims, and the settlement between the judge's father and one of the parties, and failed to rule on counsel's motion to recuse made after the conflict was discovered. Miss. Comm'n on Judicial Performance v. Bowen, 123 So. 3d 381 (Miss. 2013).

RESEARCH REFERENCES

ALR. Construction and Application of Rule of Necessity in Judicial Actions, Providing that a Judge Is Not Disqualified to Try a Case Because of Personal Interest If Case Cannot Be Heard Otherwise. 27 A.L.R.6th 403.

FEDERAL RULES OF APPELLATE PROCEDURE WITH FIFTH CIRCUIT RULES AND INTERNAL OPERATING PROCEDURES

Federal Rules of Appellate Procedure, (Effective December 1, 2013), Fifth Circuit Rules and Internal Operating Procedures (IOP) (As amended through December 1, 2013)

TITLE V. EXTRAORDINARY WRITS

TITLE VI. HABEAS CORPUS; PROCEEDINGS IN FORMA PAUPERIS

TITLE VII. GENERAL PROVISIONS

TITLE I. APPLICABILITY OF RULES

FRAP 1. Scope of rules; title.

(a) *Scope of rules.*

(1) These rules govern procedure in the United States courts of appeals.

(2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.

(b) *Definition.* In these rules, 'state' includes the District of Columbia and any United States commonwealth or territory.

(c) *Title.* These rules are to be known as the Federal Rules of Appellate Procedure. (Amended effective December 1, 2010.)

FRAP 2. Suspension of rules.

On its own or a party's motion, a court of appeals may — to expedite its decision or for other good cause — suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

TITLE II. APPEAL FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

FRAP 3. Appeal as of right — How taken.

(a) *Filing the notice of appeal.*

(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

(2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal.

(3) An appeal from a judgment by a magistrate judge in a civil case is taken in the same way as an appeal from any other district court judgment.

(4) An appeal by permission under 28 U.S.C. § 1292(b) or an appeal in a bankruptcy case may be taken only in the manner prescribed by Rules 5 and 6, respectively.

(b) *Joint or consolidated appeals.*

(1) When two or more parties are entitled to appeal from a district-court judgment or order, and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant.

(2) When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the court of appeals.

(c) *Contents of the notice of appeal.*

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";

(B) designate the judgment, order, or part thereof being appealed; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

(5) Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(d) *Serving the notice of appeal.*

(1) The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record — excluding the appellant's — or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, either by personal service or by mail addressed to the defendant. The clerk must promptly send a copy of the notice of appeal and of the docket entries — and any later docket entries — to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

(2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice.

(3) The district clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk mails copies, with the date of mailing. Service is sufficient despite the death of a party or the party's counsel.

(e) *Payment of fees.* Upon filing a notice of appeal, the appellant must pay the district clerk all required fees. The district clerk receives the appellate docket fee on behalf of the court of appeals.

Circuit Rule 3. Filing fee.

Filing Fee. When the notice of appeal is filed, the $455 fees established by 28 U.S.C. §§ 1913 and 1917 must be paid to the district court clerk. After the Fifth Circuit receives a duplicate copy of a notice of appeal, the clerk will send counsel or a party notice advising of other requirements of the rule. No additional fees are required. Failure to pay the fees does not prevent the appeal from being docketed, but is grounds for dismissal under 5th Cir. R. 42.

FRAP 3.1. Appeal from a judgment of a magistrate judge in a civil case.

[Abrogated].

FRAP 4. Appeal as of right — When taken.

(a) *Appeal in a civil case.*

(1) *Time for filing a notice of appeal.*

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf -- including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) *Filing before entry of judgment.* A notice of appeal filed after the court announces a decision or order — but before the entry of the judgment or order — is treated as filed on the date of and after the entry.

(3) *Multiple appeals.* If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) *Effect of a motion on a notice of appeal.*

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment — but before it disposes of any motion listed in Rule 4(a)(4)(A) — the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal — in compliance with Rule 3(c) — within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) *Motion for extension of time.*

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) *Reopening the time to file an appeal.* The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) *Entry defined.*

(A) A judgment or order is entered for purposes of this Rule 4(a);

(i) if Federal Rule of Civil Procedure 58(a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order.

(b) *Appeal in a criminal case.*

(1) *Time for filing a notice of appeal.*

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

(2) *Filing before entry of judgment.* A notice of appeal filed after the court announces a decision, sentence, or order — but before the entry of the judgment or order — is treated as filed on the date of and after the entry.

(3) *Effect of a motion on a notice of appeal.*

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 14 days after the entry of the order disposing of the last such remaining motion, or within 14 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 14 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order — but before it disposes of any of the motions referred to in Rule 4(b)(3)(A) — becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective — without amendment — to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(4) *Motion for extension of time.* Upon a finding of excusable neglect or good cause, the district court may — before or after the time has expired, with or without motion and notice — extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) *Jurisdiction.* The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) *Entry defined.* A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

(c) *Appeal by an inmate confined in an institution.*

(1) If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs

from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) *Mistaken filing in the court of appeals.* If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted. (Amended effective December 1, 2005; amended effective December 1, 2009; amended effective December 1, 2010.)

FRAP 5. Appeal by permission.

(a) *Petition for permission to appeal.*

(1) To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition for permission to appeal. The petition must be filed with the circuit clerk with proof of service on all other parties to the district-court action.

(2) The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.

(3) If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, either on its own or in response to a party's motion, to include the required permission or statement. In that event, the time to petition runs from entry of the amended order.

(b) *Contents of the petition; answer or cross-petition; oral argument.*

(1) The petition must include the following:

(A) the facts necessary to understand the question presented;

(B) the question itself;

(C) the relief sought;

(D) the reasons why the appeal should be allowed and is authorized by a statute or rule; and

(E) an attached copy of:

(i) the order, decree, or judgment complained of and any related opinion or memorandum, and

(ii) any order stating the district court's permission to appeal or finding that the necessary conditions are met.

(2) A party may file an answer in opposition or a cross-petition within 10 days after the petition is served.

(3) The petition and answer will be submitted without oral argument unless the court of appeals orders otherwise.

(c) *Form of papers; number of copies.* All papers must conform to Rule 32(c)(2). Except by the court's permission, a paper must not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

(d) *Grant of permission; fees; cost bond; filing the record.*

(1) Within 14 days after the entry of the order granting permission to appeal, the appellant must:

(A) pay the district clerk all required fees; and

(B) file a cost bond if required under Rule 7.

(2) A notice of appeal need not be filed. The date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under these rules.

(3) The district clerk must notify the circuit clerk once the petitioner has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket. The record must be forwarded and filed in accordance with Rules 11 and 12(c).

Circuit Rule 5. Length of petition.

Length. The certificate of interested persons required by 5th Cir. R. 28.2.1 does not count toward the page limit.

FRAP 5.1. Appeal by leave under 28 U.S.C. § 636(c)(5).

[Abrogated].

FRAP 6. Appeal in a bankruptcy case from a final judgment, order, or decree of a District Court or Bankruptcy Appellate Panel.

(a) *Appeal from a judgment, order, or decree of a district court exercising original jurisdiction in a bankruptcy case.* An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules.

(b) *Appeal from a judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case.*

(1) *Applicability of other rules.* These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b). But there are 3 exceptions:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, 12(b), 13-20, 22-23, and 24(b) do not apply;

(B) the reference in Rule 3(c) to "Form 1 in the Appendix of Forms" must be read as a reference to Form 5; and

(C) when the appeal is from a bankruptcy appellate panel, the term "district court," as used in any applicable rule, means "appellate panel."

(2) *Additional rules.* In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

(A) *Motion for rehearing.*

(i) If a timely motion for rehearing under Bankruptcy Rule 8015 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree — but before disposi-

tion of the motion for rehearing — becomes effective when the order disposing of the motion for rehearing is entered.

(ii) Appellate review of the order disposing of the motion requires the party, in compliance with Rules 3(c) and 6(b)(1)(B), to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal within the time prescribed by Rule 4 — excluding Rules 4(a)(4) and 4(b) — measured from the entry of the order disposing of the motion.

(iii) No additional fee is required to file an amended notice.

(B) *The record on appeal.*

(i) Within 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule 8006 — and serve on the appellee — a statement of the issues to be presented on appeal and a designation of the record to be certified and sent to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within 14 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

(iii) The record on appeal consists of:

- the redesignated record as provided above;
- the proceedings in the district court or bankruptcy appellate panel; and
- a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(C) *Forwarding the record.*

(i) When the record is complete, the district clerk or bankruptcy appellate panel clerk must number the documents constituting the record and send them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified. Unless directed to do so by a party or the circuit clerk, the clerk will not send to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their transportation and receipt.

(ii) All parties must do whatever else is necessary to enable the clerk to assemble and forward the record. The court of appeals may provide by rule or order that a certified copy of the docket entries be sent in place of the redesignated record, but any party may request at any time during the pendency of the appeal that the redesignated record be sent.

(D) *Filing the record.* Upon receiving the record — or a certified copy of the docket entries sent in place of the redesignated record — the circuit clerk must file it and immediately notify all parties of the filing date.

FRAP 7. Bond for costs on appeal in a civil case.

In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal. Rule 8(b) applies to a surety on a bond given under this rule.

FRAP 8. Stay or injunction pending appeal.

(a) *Motion for stay.*

(1) *Initial motion in the district court.* A party must ordinarily move first in the district court for the following relief:

(A) a stay of the judgment or order of a district court pending appeal;

(B) approval of a supersedeas bond; or

(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending.

(2) *Motion in the court of appeals; conditions on relief.* A motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges.

(A) The motion must:

(i) show that moving first in the district court would be impracticable; or

(ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action.

(B) The motion must also include:

(i) the reasons for granting the relief requested and the facts relied on;

(ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and

(iii) relevant parts of the record.

(C) The moving party must give reasonable notice of the motion to all parties.

(D) A motion under this Rule 8(a)(2) must be filed with the circuit clerk and normally will be considered by a panel of the court. But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge.

(E) The court may condition relief on a party's filing a bond or other appropriate security in the district court.

(b) *Proceeding against a surety.* If a party gives security in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the district court and irrevocably appoints the district clerk as the surety's agent on whom any papers affecting the surety's liability on the bond or undertaking may be served. On motion, a surety's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the district clerk, who must promptly mail a copy to each surety whose address is known.

(c) *Stay in a criminal case.* Rule 38 of the Federal Rules of Criminal Procedure governs a stay in a criminal case.

Circuit Rule 8. Stay or injunction pending appeal.

Procedures in Death Penalty Cases Involving Applications for Immediate Stay of Execution and Appeals in Matters in Which the District Court Has Either Entered or Refused To Enter a Stay

8.1 Documents Required. Non-death penalty cases will be handled as described in Fed. R. App. P. 8. Death penalty cases arising from actions brought under 28 U.S.C. §§ 2254 and 2255 will be processed under the procedures found in this rule. The appellant must file 4 copies of the motion for stay and attach, to each, legible copies of the documents listed below. If the appellant asserts there is insufficient time to file a written motion, the appellant must deliver to the clerk 4 legible copies of each of the listed documents as soon as possible. If the appellant cannot attach or deliver any listed document, a statement why it cannot be provided must be substituted. The documents required are:

(a) The complaint or petition to the district court;

(b) Each brief or memorandum of authorities filed by both parties in the district court;

(c) The opinion giving the district court's reasons for denying relief;

(d) The district court judgment denying relief;

(e) The application to the district court for a stay;

(f) The district court order granting or denying a stay, and the statement of reasons for its action;

(g) The certificate of appealability or, if there is none, the order denying a certificate of appealability;

(h) A copy of each state or federal court opinion or judgment involving any issue presented to this court or, if the ruling was not made in a written opinion or judgment, a copy of the relevant portions of the transcript.

8.1.1 If the state indicates that it does not oppose the stay, and the applicant states this fact in the application, these documents do not need to be filed with the application but must be filed within 14 days after the application is filed.

8.1.2 If the appellant raises an issue that was not raised before the district court or has not been exhausted in state court, the applicant must give the reasons why prior action was not taken and why a stay should be granted.

8.2 Panels. Death penalty case matters are handled by special panels selected in rotation from the court's regular screening panels. See 5th Cir. R. 27.2.3 for handling applications for certificates of appealability.

8.3 Motions To Vacate Stays. If the district court enters an order staying execution of a judgment, the party seeking to vacate the stay will attach 4 copies of each of the documents required by 5th Cir. R. 8.1 to the motion.

8.4 Emergency Motions. Emergency motions or applications, whether addressed to the court or to an individual judge, must be filed with the clerk rather than with an individual judge. If there is insufficient time to file a motion or application in person, by mail, or by fax, counsel may communicate with the clerk by telephone and thereafter must file the motion in writing with the clerk as soon as possible. The motion, application, or oral communication must contain a brief account of the prior actions of this or any other court or

judge to which the motion or application, or a substantially similar or related petition for relief, was submitted.

8.5 Merits. The parties must address the merits of each issue presented by an application. The panel may allow additional time to permit the parties adequate opportunity to do so.

8.6 Consideration of Merits. If a certificate of appealability has been granted, the panel assigned to decide a motion for a stay of a state court judgment must, before denying a stay, consider and expressly rule on the merits of the appeal, unless the panel finds that the appeal is frivolous and entirely without merit.

8.7 Vacating Stays. The panel assigned to an appeal must consider the merits before vacating a stay of execution, unless the panel rules the appeal is frivolous and entirely without merit.

8.8 Mandate. The panel may order the mandate issued instantly or after such time as it may fix.

8.9 Stays of Execution Following Decision. Stays to permit the filing and consideration of a petition for a writ of certiorari ordinarily will not be granted. The court must determine whether there is a reasonable probability that 4 members of the Supreme Court would consider the underlying issues sufficiently meritorious for the grant of certiorari and whether there is a substantial possibility of reversal of its decision, in addition to a likelihood that irreparable harm will result if its decision is not stayed.

8.10 Time Requirements for Challenges to Death Sentences and/or Execution Procedures. Inmates sentenced to death who wish to appeal an adverse judgment by the district court on a first petition for writ of habeas corpus, who seek permission to file a successive petition, or who seek to challenge their convictions, sentences, or the execution procedures (including but not limited to a suit filed pursuant to 42 U.S.C. § 1983), must exercise reasonable diligence in moving for a certificate of appealability, for permission to file a second or successive habeas petition, or in filing a notice of appeal from an adverse judgment of the district court in any other type of proceeding, and a stay of execution with the clerk of this court at least 7 days before the scheduled execution. Counsel who seek a certificate of appealability, permission to file a successive petition, or an appeal from a district court judgment less than 7 days before the scheduled execution must attach to the proposed filing a detailed explanation stating under oath the reason for the delay. If the motions are filed less than 7 days before the scheduled execution, the court may direct counsel to show good cause for the late filing. If counsel cannot do so, counsel will be subject to sanctions.

If the state asks this court to vacate a district court order staying an execution, counsel for the state will file the state's appeal and application for relief from the stay as soon as practicable after the district court issues its order. Any unjustified delay by the state's counsel in seeking relief in this court will subject counsel to sanctions. (Amended Dec. 1, 2002; Dec. 1, 2006; As amended Dec. 1, 2009.)

FRAP 9. Release in a criminal case.

(a) *Release before judgment of conviction.*

(1) The district court must state in writing, or orally on the record, the reasons for an order regarding the release or detention of a defendant in a criminal case. A party appealing from the order must file with the court of appeals a copy of the district court's order and the court's statement of reasons as soon as practicable after filing the notice of appeal. An appellant who questions the factual basis for the district court's order must file a transcript of the release proceedings or an explanation of why a transcript was not obtained.

(2) After reasonable notice to the appellee, the court of appeals must promptly determine the appeal on the basis of the papers, affidavits, and parts of the record that the parties present or the court requires. Unless the court so orders, briefs need not be filed.

(3) The court of appeals or one of its judges may order the defendant's release pending the disposition of the appeal.

(b) *Release after judgment of conviction.* A party entitled to do so may obtain review of a district-court order regarding release after a judgment of conviction by filing a notice of appeal from that order in the district court, or by filing a motion in the court of appeals if the party has already filed a notice of appeal from the judgment of conviction. Both the order and the review are subject to Rule 9(a). The papers filed by the party seeking review must include a copy of the judgment of conviction.

(c) *Criteria for release.* The court must make its decision regarding release in accordance with the applicable provisions of 18 U.S.C. §§ 3142, 3143, and 3145(c).

Circuit Rule 9. Release in a criminal case.

9.1 Release Before Judgment of Conviction. The clerk's office will advise counsel of the requirements of this rule after receiving a copy of a notice of appeal from the district court from an order respecting release entered prior to a judgment of conviction (Fed. R. App. P. 9(a)), or on counsel's advice a notice of appeal has been or will be filed.

Four copies of a memorandum must be filed within 10 days of the filing of the notice of appeal, clearly setting out the nature and circumstances of the offense charged and why the order respecting release is unsupported by the district court proceedings.

9.2 Release After Judgment of Conviction. The original and 3 copies of an application regarding release pending appeal from a judgment of conviction (Fed. R. App. P. 9(b)) must be filed with the clerk of this court.

(a) The application for release must contain:

(1) The appellant's name;

(2) The district court docket number;

(3) The offense of which appellant was convicted; and

(4) The date and terms of sentence.

(b) The application must also contain:

(1) The legal basis for the contention that appellant is unlikely to flee or pose a danger to the safety of any other person or the community;

(2) An explanation why the district court's findings are clearly erroneous; and

(3) The issues to be raised on appeal that present substantial questions of law or fact likely to result in reversal or an order for a new trial on all counts of the indictment on which incarceration has been imposed, with pertinent legal argument establishing that the questions are substantial.

9.3 Required Documents. A copy of the district court's order respecting release pending trial or appeal, containing the written reasons for its ruling, must be appended to the memorandum or the application filed under 5th Cir. R. 9.1 or 9.2.

(a) If the appellant questions the factual basis of the order, a transcript of the district court proceedings on the motion for release must be filed with this court. If the transcript is not filed with the memorandum or application, the appellant must attach a court reporter's certificate verifying that the transcript has been ordered and that satisfactory financial arrangements have been made to pay for it, together with the transcript's estimated date of completion.

(b) If the appellant cannot obtain a transcript of the proceedings, the appellant must state in an affidavit the reasons why not.

9.4 Service. A copy of the memorandum or application filed under 5th Cir. R. 9.1 or 9.2 must be hand-delivered to government counsel or served by other expeditious method.

9.5 Response. The opposing party must file a written response to all requests for release within 10 days after service of the memorandum or application. (Amended Dec. 1, 2002; July 15, 2003; As amended Dec. 1, 2009.)

FRAP 10. The record on appeal.

(a) *Composition of the record on appeal.* The following items constitute the record on appeal:

(1) the original papers and exhibits filed in the district court;

(2) the transcript of proceedings, if any; and

(3) a certified copy of the docket entries prepared by the district clerk.

(b) *The transcript of proceedings.*

(1) *Appellant's duty to order.* Within 14 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later, the appellant must do either of the following:

(A) order from the reporter a transcript of such parts of the proceedings not already on file as the appellant considers necessary, subject to a local rule of the court of appeals and with the following qualifications:

(i) the order must be in writing;

(ii) if the cost of the transcript is to be paid by the United States under the Criminal Justice Act, the order must so state; and

(iii) the appellant must, within the same period, file a copy of the order with the district clerk; or

(B) file a certificate stating that no transcript will be ordered.

(2) *Unsupported finding or conclusion.* If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion.

(3) *Partial transcript.* Unless the entire transcript is ordered:

(A) the appellant must — within the 14 days provided in Rule 10(b)(1) — file a statement of the issues that the appellant intends to present on the appeal and must serve on the appellee a copy of both the order or certificate and the statement;

(B) if the appellee considers it necessary to have a transcript of other parts of the proceedings, the appellee must, within 14 days after the service of the order or certificate and the statement of the issues, file and serve on the appellant a designation of additional parts to be ordered; and

(C) unless within 14 days after service of that designation the appellant has ordered all such parts, and has so notified the appellee, the appellee may within the following 14 days either order the parts or move in the district court for an order requiring the appellant to do so.

(4) *Payment.* At the time of ordering, a party must make satisfactory arrangements with the reporter for paying the cost of the transcript.

(c) *Statement of the evidence when the proceedings were not recorded or when a transcript is unavailable.* If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal.

(d) *Agreed statement as the record on appeal.* In place of the record on appeal as defined in Rule 10(a), the parties may prepare, sign, and submit to the district court a statement of the case showing how the issues presented by the appeal arose and were decided in the district court. The statement must set forth only those facts averred and proved or sought to be proved that are essential to the court's resolution of the issues. If the statement is truthful, it — together with any additions that the district court may consider necessary to a full presentation of the issues on appeal — must be approved by the district court and must then be certified to the court of appeals as the record on appeal. The district clerk must then send it to the circuit clerk within the time provided by Rule 11. A copy of the agreed statement may be filed in place of the appendix required by Rule 30.

(e) *Correction or modification of the record.*

(1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly.

(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:

(A) on stipulation of the parties;

(B) by the district court before or after the record has been forwarded; or

(C) by the court of appeals.

(3) All other questions as to the form and content of the record must be presented to the court of appeals.

Circuit Rule 10. The record on appeal.

10.1 Appellant's Duty to Order the Transcript. The appellant's order of the transcript of proceedings, or parts thereof, contemplated by Fed. R. App. P. 10(b), must be on a form prescribed by the clerk. Counsel will furnish a copy of the order form to the clerk and to the other parties set out in Fed. R. App. P. 10(b). If no transcript needs to be ordered, appellant must file with the clerk a copy of a certificate to that effect that counsel served on the parties under Fed. R. App. P. 10(b).

10.2 Form of Record. The district court must furnish the record on appeal to this court in paper form, and in electronic form whenever available. The paper and electronic records on appeal must be consecutively numbered and paginated. The paper record must be bound in a manner that facilitates reading.

I.O.P.

The district court will furnish a transcript order form, required by this court, when the notice of appeal is filed. Once counsel completes the transcript order, forwards it to the reporter, and makes adequate financial arrangements, counsel's responsibility under Fed. R. App. P. 10 and 11 is fulfilled.

FRAP 11. Forwarding the record.

(a) *Appellant's duty.* An appellant filing a notice of appeal must comply with Rule 10(b) and must do whatever else is necessary to enable the clerk to assemble and forward the record. If there are multiple appeals from a judgment or order, the clerk must forward a single record.

(b) *Duties of reporter and district clerk.*

(1) *Reporter's duty to prepare and file a transcript.* The reporter must prepare and file a transcript as follows:

(A) Upon receiving an order for a transcript, the reporter must enter at the foot of the order the date of its receipt and the expected completion date and send a copy, so endorsed, to the circuit clerk.

(B) If the transcript cannot be completed within 30 days of the reporter's receipt of the order, the reporter may request the circuit clerk to grant additional time to complete it. The clerk must note on the docket the action taken and notify the parties.

(C) When a transcript is complete, the reporter must file it with the district clerk and notify the circuit clerk of the filing.

(D) If the reporter fails to file the transcript on time, the circuit clerk must notify the district judge and do whatever else the court of appeals directs.

(2) *District clerk's duty to forward.* When the record is complete, the district clerk must number the documents constituting the record and send them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified. Unless directed to do so by a party or the circuit clerk, the district clerk will not send to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their transportation and receipt.

(c) *Retaining the record temporarily in the district court for use in preparing the appeal.* The parties may stipulate, or the district court on motion may order, that the district clerk retain the record temporarily for the parties to use in preparing the papers on appeal. In that event the district clerk must certify to the circuit clerk that the record on appeal is complete. Upon receipt of the appellee's brief, or earlier if the court orders or the parties agree, the appellant must request the district clerk to forward the record.

(d) *[Abrogated.]*

(e) *Retaining the record by court order.*

(1) The court of appeals may, by order or local rule, provide that a certified copy of the docket entries be forwarded instead of the entire record. But a party may at any time during the appeal request that designated parts of the record be forwarded.

(2) The district court may order the record or some part of it retained if the court needs it while the appeal is pending, subject, however, to call by the court of appeals.

(3) If part or all of the record is ordered retained, the district clerk must send to the court of appeals a copy of the order and the docket entries together with the parts of the original record allowed by the district court and copies of any parts of the record designated by the parties.

(f) *Retaining parts of the record in the district court by stipulation of the parties.* The parties may agree by written stipulation filed in the district court that designated parts of the record be retained in the district court subject to call by the court of appeals or request by a party. The parts of the record so designated remain a part of the record on appeal.

(g) *Record for a preliminary motion in the court of appeals.* If, before the record is forwarded, a party makes any of the following motions in the court of appeals:

- for dismissal;
- or release;
- for a stay pending appeal;
- for additional security on the bond on appeal or on a supersedeas bond; or
- for any other intermediate order -

the district clerk must send the court of appeals any parts of the record designated by any party.

Circuit Rule 11. Transmission of the record.

11.1 Duties of Court Reporters. In all cases where transcripts are ordered, the court reporter must use a form provided by the clerk of this court and:

(a) Acknowledge receiving the transcript order, and indicate the date of receipt;

(b) State whether adequate financial arrangements have been made under the CJA, or otherwise;

(c) Provide the number of trial or hearing days involved in the transcript, and estimate the total number of pages;

(d) Give an estimated date when the transcript will be finished; and

(e) Certify that he or she expects to file the transcript with the district court clerk within the time estimated.

11.2 Requests for Extensions of Time. Court reporters seeking extensions of the time for filing the transcript beyond the 30 day period fixed by Fed. R. App. P. 11(b) must file an extension request with the clerk of this court and must specify in detail:

(a) The amount of work accomplished on the transcript;

(b) A list of all outstanding transcripts due to this and other courts, including the due dates for filing; and

(c) A verification that the trial court judge who tried the case is aware of and approves the extension request.

If a court reporter's request for an extension of time is granted, he or she must promptly notify all counsel or unrepresented parties of the extended filing date and send a copy of the notification to this court.

11.3 Duty of the Clerk. The district court clerk is responsible for determining when the record on appeal is complete for purposes of the appeal. Unless the record on appeal is sent to this court within 15 days from the filing of the notice of appeal or 15 days after the filing of the transcript of any trial proceedings, whichever is later, the district court clerk must advise the clerk of this court of the reasons for delay and request an extension to file the record. The clerk of this court may grant an extension for no more than 45 days. Extensions beyond 45 days are referred to a single judge. When transmitting the record on appeal in a direct criminal appeal involving more than one defendant, the district court must separate and identify the pleadings and any transcripts of pre-trial, sentencing, and post-trial hearings that apply to fewer than all of the defendants. However, only one copy of the trial transcript is required. In an action involving more than one defendant at trial but where separate actions are filed under 28 U.S.C. § 2255, the district court must separate and identify the pleadings and transcripts of pre-trial, sentencing, and post-trial hearings that apply to less than all of the defendants. One copy of the trial transcript is required for each defendant filing a separate § 2255 action.

I.O.P.

The clerk will monitor all outstanding transcripts and delays.

On October 11, 1982, the Fifth Circuit Judicial Council adopted a resolution requiring each district court in the Fifth Circuit to develop a court reporter

management plan providing for the day-to-day management and supervision of an efficient court reporting service within the district court. These plans must provide for the supervision of court reporters in their relations with litigants as specified in the Court Reporter Act, including fees charged for transcripts, adherence to transcript format prescriptions, and delivery schedules. The plans must also provide that a judge, the clerk, or some other person designated by the court supervises the court reporters.

FRAP 12. Docketing the appeal; filing a representation statement; filing the record.

(a) *Docketing the appeal.* Upon receiving the copy of the notice of appeal and the docket entries from the district clerk under Rule 3(d), the circuit clerk must docket the appeal under the title of the district-court action and must identify the appellant, adding the appellant's name if necessary.

(b) *Filing a representation statement.* Unless the court of appeals designates another time, the attorney who filed the notice of appeal must, within 14 days after filing the notice, file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

(c) *Filing the record, partial record, or certificate.* Upon receiving the record, partial record, or district clerk's certificate as provided in Rule 11, the circuit clerk must file it and immediately notify all parties of the filing date.

FRAP 12.1. Remand After an Indicative Ruling by the District Court on a Motion for Relief That Is Barred by a Pending Appeal.

(a) *Notice to the Court of Appeals.* If a timely motion is made in the district court for relief that it lacks authority to grant because of an appeal that has been docketed and is pending, the movant must promptly notify the circuit clerk if the district court states either that it would grant the motion or that the motion raises a substantial issue.

(b) *Remand After an Indicative Ruling.* If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal. If the court of appeals remands but retains jurisdiction, the parties must promptly notify the circuit clerk when the district court has decided the motion on remand.

Circuit Rule 12. Representation statement.

Counsel can satisfy the "representation statement" required by Fed. R. App. P. 12(b) by completing this court's "Notice of Appearance Form" and returning it to the clerk within 30 days of filing the notice of appeal.

TITLE III. APPEALS FROM THE UNITED STATES TAX COURT

FRAP 13. Appeals from the tax court.

(a) *Appeal as of right.*

(1) *How Obtained: Time for Filing a Notice of Appeal.*

(A) An appeal as of right from the United States Tax Court is commenced by filing a notice of appeal with the Tax Court clerk within 90 days after the entry of the Tax Court's decision. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d). If one party files a timely notice of appeal, any other party may file a notice of appeal within 120 days after the Tax Court's decision is entered.

(B) If, under Tax Court rules, a party makes a timely motion to vacate or revise the Tax Court's decision, the time to file a notice of appeal runs from the entry of the order disposing of the motion or from the entry of a new decision, whichever is later.

(2) *Notice of appeal; how filed.* The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by mail addressed to the clerk. If sent by mail the notice is considered filed on the postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

(3) *Contents of the notice of appeal; service; effect of filing and service.* Rule 3 prescribes the contents of a notice of appeal, the manner of service, and the effect of its filing and service. Form 2 in the Appendix of Forms is a suggested form of a notice of appeal.

(4) *The record on appeal; forwarding; filing.*

(A) Except as otherwise provided under Tax Court rules for the transcript of proceedings, the appeal is governed by the parts of Rules 10, 11, and 12 regarding the record on appeal from a district court, the time and manner of forwarding and filing, and the docketing in the court of appeals.

(B) If an appeal is taken to more than one court of appeals, the original record must be sent to the court named in the first notice of appeal filed. In an appeal to any other court of appeals, the appellant must apply to that other court to make provision for the record.

(b) *Appeal by Permission.* An appeal by permission is governed by Rule 5. (Amended effective December 1, 2013..)

FRAP 14. Applicability of other rules to appeals from the tax court.

All provisions of these rules, except Rules 4, 6-9, 15-20, and 22-23, apply to appeals from the Tax Court. References in any applicable rule (other than Rule 24(a)) to the district court and district clerk are to be read as referring to the Tax Court and its clerk. (Amended effective December 1, 2013..)

TITLE IV. REVIEW OR ENFORCEMENT OF AN ORDER OF AN ADMINISTRATIVE AGENCY, BOARD, COMMISSION, OR OFFICER

FRAP 15. Review or enforcement of an agency order — How obtained; intervention.

(a) *Petition for review; joint petition.*

(1) Review of an agency order is commenced by filing, within the time prescribed by law, a petition for review with the clerk of a court of appeals authorized to review the agency order. If their interests make joinder practicable, two or more persons may join in a petition to the same court to review the same order.

(2) The petition must:

(A) name each party seeking review either in the caption or the body of the petition — using such terms as "et al.," "petitioners," or "respondents" does not effectively name the parties;

(B) name the agency as a respondent (even though not named in the petition, the United States is a respondent if required by statute); and

(C) specify the order or part thereof to be reviewed.

(3) Form 3 in the Appendix of Forms is a suggested form of a petition for review.

(4) In this rule "agency" includes an agency, board, commission, or officer; "petition for review" includes a petition to enjoin, suspend, modify, or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute.

(b) *Application or cross-application to enforce an order; answer; default.*

(1) An application to enforce an agency order must be filed with the clerk of a court of appeals authorized to enforce the order. If a petition is filed to review an agency order that the court may enforce, a party opposing the petition may file a cross-application for enforcement.

(2) Within 21 days after the application for enforcement is filed, the respondent must serve on the applicant an answer to the application and file it with the clerk. If the respondent fails to answer in time, the court will enter judgment for the relief requested.

(3) The application must contain a concise statement of the proceedings in which the order was entered, the facts upon which venue is based, and the relief requested.

(c) *Service of the petition or application.* The circuit clerk must serve a copy of the petition for review, or an application or cross-application to enforce an agency order, on each respondent as prescribed by Rule 3(d), unless a different manner of service is prescribed by statute. At the time of filing, the petitioner must:

(1) serve, or have served, a copy on each party admitted to participate in the agency proceedings, except for the respondents;

(2) file with the clerk a list of those so served; and

(3) give the clerk enough copies of the petition or application to serve each respondent.

(d) *Intervention.* Unless a statute provides another method, a person who wants to intervene in a proceeding under this rule must file a motion for leave to intervene with the circuit clerk and serve a copy on all parties. The motion — or other notice of intervention authorized by statute — must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention.

(e) *Payment of fees.* When filing any separate or joint petition for review in a court of appeals, the petitioner must pay the circuit clerk all required fees.

Circuit Rule 15. Review or enforcement of an agency order — How obtained; intervention.

15.1 Docketing Fee and Copy of Orders — Agency Review Proceedings. At the time a party files a petition for review under Fed. R. App. P. 15, the party must:

(a) Pay the filing fee to the clerk; and

(b) Attach a copy of the order or orders to be reviewed.

15.2 Proceedings for Enforcement of Orders of the National Labor Relations Board. In National Labor Relations Board enforcement proceedings under Fed. R. App. P. 15(b), the respondent is considered the petitioner, and the board the respondent, for briefing and oral argument purposes, unless otherwise ordered by the court.

15.3 Proceedings for Review of Orders of the Federal Energy Regulatory Commission.

15.3.1 Petition for Review. Every petition for review must specify in its caption the number, date, and identification of the order reviewed and append the service list required by Fed. R. App. P. 15(c). Counsel filing the petition must attach a certificate that the commission has posted, filed or entered the order being reviewed.

15.3.2 Docketing. All petitions for review and other documents concerning commission orders in the same number series (i.e., 699, 699A, 699B) are assigned to the same docket.

15.3.3 Intervention.

(a) *Party.* A party to a commission proceeding may intervene in a review of the proceeding in this court by filing a notice of intervention. The notice must state whether the intervenor is a petitioner who objects to the order or a respondent who supports the order. A notice of intervention confers petitioner or respondent status on the intervening party as to all proceedings.

(b) *Nonparty.* A person who is not a party to a commission proceeding desiring to intervene in a review of that proceeding must file with the clerk, and serve upon all parties to the proceeding, a motion for leave to intervene. The motion must contain a concise statement of the moving party's interest, the grounds upon which intervention is sought, and why the interest asserted is not adequately protected by existing parties. Oppositions to such motions must be filed within 14 days of service.

15.3.4 Docketing Statement. All parties filing petitions for review must file a joint docketing statement within 30 days of the filing of the initial petition for review, but not later than 14 days after the expiration of the period permitted for filing a petition for review. The docketing statement must:

(a) List each issue to be raised in the review;

(b) List any other pending review proceeding of the same order in any other court; and

(c) Attach copies of the order to be reviewed.

Every petitioner filing for review after filing a docketing statement must specify in the petition for review any exceptions taken or additions to the issues listed in the docketing statement. Every party who intervenes after the filing of the docketing statement must specify in the notice of intervention any exceptions taken to the issues listed in the docketing statement.

15.3.5 Prehearing Conference. The clerk may give notice of a prehearing conference 10 days after filing of a docketing statement, or 14 days after entry of an order by the court deciding a venue issue, whichever is later. The prehearing conference will:

(a) Simplify and define issues;

(b) Agree on an appendix and record;

(c) Assign joint briefing responsibilities and schedule briefs; and

(d) Resolve any other matters aiding in the disposition of the proceeding.

Except for good cause, any party who petitions for review or intervenes after prehearing conference has been held is bound by the result of the prehearing conference.

15.3.6 Severance. Any petitioner or respondent may move to sever parties or issues by showing prejudice.

15.4 Proceedings for Review of Orders of the Benefits Review Board. In petitions filed by either the claimant or the employer under 33 U.S.C. § 921 to review orders of the Benefits Review Board, the Office of Workers Compensation of the United States Department of Labor, the nominal respondent, is aligned with the claimant for briefing and oral argument purposes, unless otherwise ordered by the court. Within 30 days of the filing of the petition for review of the board's decision, the petitioner must file a statement of the issues to be presented on appeal and serve them on the director and counsel for all parties so the appropriate alignment can be made.

15.5 Time for Filing Motion for Intervention. Time for Filing Motion for Intervention. A motion to intervene under Fed. R. App. P. 15(d) should be filed promptly after the petition for review of the agency proceeding is filed, but not later than 14 days prior to the due date of the brief of the party supported by the intervenor. (Amended Dec. 1, 2002; July 15, 2003; As amended Dec. 1, 2009.)

FRAP 15.1. Briefs and oral argument in a national labor relations board proceeding.

In either an enforcement or a review proceeding, a party adverse to the National Labor Relations Board proceeds first on briefing and at oral argument, unless the court orders otherwise.

FRAP 16. The record on review or enforcement.

(a) *Composition of the record.* The record on review or enforcement of an agency order consists of:

(1) the order involved;

(2) any findings or report on which it is based; and

(3) the pleadings, evidence, and other parts of the proceedings before the agency.

(b) *Omissions from or misstatements in the record.* The parties may at any time, by stipulation, supply any omission from the record or correct a misstatement, or the court may so direct. If necessary, the court may direct that a supplemental record be prepared and filed.

FRAP 17. Filing the record.

(a) *Agency to file; time for filing; notice of filing.* The agency must file the record with the circuit clerk within 40 days after being served with a petition for review, unless the statute authorizing review provides otherwise, or within 40 days after it files an application for enforcement unless the respondent fails to answer or the court orders otherwise. The court may shorten or extend the time to file the record. The clerk must notify all parties of the date when the record is filed.

(b) *Filing — What constitutes.*

(1) The agency must file:

(A) the original or a certified copy of the entire record or parts designated by the parties; or

(B) a certified list adequately describing all documents, transcripts of testimony, exhibits, and other material constituting the record, or describing those parts designated by the parties.

(2) The parties may stipulate in writing that no record or certified list be filed. The date when the stipulation is filed with the circuit clerk is treated as the date when the record is filed.

(3) The agency must retain any portion of the record not filed with the clerk. All parts of the record retained by the agency are a part of the record on review for all purposes and, if the court or a party so requests, must be sent to the court regardless of any prior stipulation.

Circuit Rule 17. Filing of the record.

Filing of the Record. Any agency failing to file the record within 40 days, must request an extension of time and provide specific reasons justifying the delay. The clerk may grant an extension for no more than 30 days. After such an extension expires, the court may order production of the record.

FRAP 18. Stay pending review.

(a) *Motion for a stay.*

(1) *Initial motion before the agency.* A petitioner must ordinarily move first before the agency for a stay pending review of its decision or order.

(2) *Motion in the court of appeals.* A motion for a stay may be made to the court of appeals or one of its judges.

(A) The motion must:

(i) show that moving first before the agency would be impracticable; or

(ii) state that, a motion having been made, the agency denied the motion or failed to afford the relief requested and state any reasons given by the agency for its action.

(B) The motion must also include:

(i) the reasons for granting the relief requested and the facts relied on;

(ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and

(iii) relevant parts of the record.

(C) The moving party must give reasonable notice of the motion to all parties.

(D) The motion must be filed with the circuit clerk and normally will be considered by a panel of the court. But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge.

(b) *Bond.* The court may condition relief on the filing of a bond or other appropriate security.

FRAP 19. Settlement of a judgment enforcing an agency order in part.

When the court files an opinion directing entry of judgment enforcing the agency's order in part, the agency must within 14 days file with the clerk and serve on each other party a proposed judgment conforming to the opinion. A party who disagrees with the agency's proposed judgment must within 10 days file with the clerk and serve the agency with a proposed judgment that the party believes conforms to the opinion. The court will settle the judgment and direct entry without further hearing or argument.

FRAP 20. Applicability of rules to the review or enforcement of an agency order.

All provisions of these rules, except Rules 3-14 and 22-23, apply to the review or enforcement of an agency order. In these rules, "appellant" includes a petitioner or applicant, and "appellee" includes a respondent.

TITLE V. EXTRAORDINARY WRITS

FRAP 21. Writs of mandamus and prohibition, and other extraordinary writs.

(a) *Mandamus or prohibition to a court: petition, filing, service, and docketing.*

(1) A party petitioning for a writ of mandamus or prohibition directed to a court must file a petition with the circuit clerk with proof of service on all parties to the proceeding in the trial court. The party must also provide a copy to the trial-court judge. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes.

(2)(A) The petition must be titled "In re [name of petitioner]."

(B) The petition must state:

(i) the relief sought;

(ii) the issues presented;

(iii) the facts necessary to understand the issue presented by the petition; and

(iv) the reasons why the writ should issue.

(C) The petition must include a copy of any order or opinion or parts of the record that may be essential to understand the matters set forth in the petition.

(3) Upon receiving the prescribed docket fee, the clerk must docket the petition and submit it to the court.

(b) *Denial; order directing answer; briefs; precedence.*

(1) The court may deny the petition without an answer. Otherwise, it must order the respondent, if any, to answer within a fixed time.

(2) The clerk must serve the order to respond on all persons directed to respond.

(3) Two or more respondents may answer jointly.

(4) The court of appeals may invite or order the trial-court judge to address the petition or may invite an amicus curiae to do so. The trial-court judge may request permission to address the petition but may not do so unless invited or ordered to do so by the court of appeals.

(5) If briefing or oral argument is required, the clerk must advise the parties, and when appropriate, the trial-court judge or amicus curiae.

(6) The proceeding must be given preference over ordinary civil cases.

(7) The circuit clerk must send a copy of the final disposition to the trial-court judge.

(c) *Other extraordinary writs.* An application for an extraordinary writ other than one provided for in Rule 21(a) must be made by filing a petition with the circuit clerk with proof of service on the respondents. Proceedings on the application must conform, so far as is practicable, to the procedures prescribed in Rule 21(a) and (b).

(d) *Form of papers; number of copies.* All papers must conform to Rule 32(c)(2). Except by the court's permission, a paper must not exceed 30 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C). An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Circuit Rule 21. Writs of mandamus and prohibition, and other extraordinary writs.

Petition for Writ. The petition must contain a certificate of interested persons as described in 5th Cir. R. 28.2.1. The certificate of interested persons and the items required by 5th Cir. R. 21 do not count toward the page limit.

In addition to the items required by Fed. R. App. P. 21, the application must contain a copy of any memoranda or briefs filed in the district court supporting

the application to that court for relief and any memoranda or briefs filed in opposition, as well as a transcript of any reasons the district court gave for its action.

TITLE VI. HABEAS CORPUS; PROCEEDINGS IN FORMA PAUPERIS

FRAP 22. Habeas corpus and Section 2255 proceedings.

(a) *Application for the original writ.* An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court. If a district court denies an application made or transferred to it, renewal of the application before a circuit judge is not permitted. The applicant may, under 28 U.S.C.S. § 2253, appeal to the court of appeals from the district court's order denying the application.

(b) *Certificate of appealability.*

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district clerk must send to the court of appeals the certificate (if any) and the statement described in Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. § 2254 or § 2255 (if any), along with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue it.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

(3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

Circuit Rule 22. Applications for certificates of appealability and motions for permission to file second or successive habeas corpus applications.

Applications for certificates of appealability, motions for permission to file second or successive applications under 28 U.S.C.S. §§ 2254 and 2255, and any responses must conform to the format requirements and the length limitations of Fed. R. App. P. 32(a), and 5th Cir. R. 32 as applicable.

I.O.P. to Fed. R. App. P. 22.

See 5th Cir. R. 27.3 concerning emergency motions. Where the district court has granted a COA, the clerk shall include in the original briefing notice a

deadline for any application for COA on additional issues, and where feasible, shall make the deadline coextensive with the briefing deadline. (Amended effective February 1, 2011.)

FRAP 23. Custody or release of a prisoner in a habeas corpus proceeding.

(a) *Transfer of custody pending review.* Pending review of a decision in a habeas corpus proceeding commenced before a court, justice, or judge of the United States for the release of a prisoner, the person having custody of the prisoner must not transfer custody to another unless a transfer is directed in accordance with this rule. When, upon application, a custodian shows the need for a transfer, the court, justice, or judge rendering the decision under review may authorize the transfer and substitute the successor custodian as a party.

(b) *Detention or release pending review of decision not to release.* While a decision not to release a prisoner is under review, the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court, may order that the prisoner be:

(1) detained in the custody from which release is sought;

(2) detained in other appropriate custody; or

(3) released on personal recognizance, with or without surety.

(c) *Release pending review of decision ordering release.* While a decision ordering the release of a prisoner is under review, the prisoner must — unless the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise — be released on personal recognizance, with or without surety.

(d) *Modification of the initial order on custody.* An initial order governing the prisoner's custody or release, including any recognizance or surety, continues in effect pending review unless for special reasons shown to the court of appeals or the Supreme Court, or to a judge or justice of either court, the order is modified or an independent order regarding custody, release, or surety is issued.

I.O.P. to Fed. R. App. P. 23.

See 5th Cir. R. 9.2 for procedures governing applications for release.

FRAP 24. Proceeding in forma pauperis.

(a) *Leave to proceed in forma pauperis.*

(1) *Motion in the district court.* Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

(2) *Action on the motion.* If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, unless a statute provides otherwise. If the district court denies the motion, it must state its reasons in writing.

(3) *Prior approval.* A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless:

(A) the district court — before or after the notice of appeal is filed — certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding; or

(B) a statute provides otherwise.

(4) *Notice of district court's denial.* The district clerk must immediately notify the parties and the court of appeals when the district court does any of the following:

(A) denies a motion to proceed on appeal in forma pauperis;

(B) certifies that the appeal is not taken in good faith; or

(C) finds that the party is not otherwise entitled to proceed in forma pauperis.

(5) *Motion in the court of appeals.* A party may file a motion to proceed on appeal in forma pauperis in the court of appeals within 30 days after service of the notice prescribed in Rule 24(a)(4). The motion must include a copy of the affidavit filed in the district court and the district court's statement of reasons for its action. If no affidavit was filed in the district court, the party must include the affidavit prescribed by Rule 24(a)(1).

(b) *Leave to proceed in forma pauperis on appeal from the United State Tax Court or on appeal or review of an administrative-agency proceeding.* When an appeal or review of a proceeding before an administrative agency, board, commission, or officer (including for the purpose of this rule the United States Tax Court) proceeds directly in a court of appeals, a party may file in the court of appeals a motion for leave to proceed on appeal in forma pauperis with an affidavit prescribed by Rule 24(a)(1).

(1) in an appeal from the United States Tax Court; and

(2) when an appeal or review of a proceeding before an administrative agency, board, commission, or officer proceeds directly in the court of appeals.

(c) *Leave to use original record.* A party allowed to proceed on appeal in forma pauperis may request that the appeal be heard on the original record without reproducing any part. (Amended December 1, 2002; amended December 1, 2013.)

TITLE VII. GENERAL PROVISIONS

FRAP 25. Filing and service.

(a) *Filing.*

(1) *Filing with the clerk.* A paper required or permitted to be filed in a court of appeals must be filed with the clerk.

(2) *Filing: method and timeliness.*

(A) *In general.* Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing.

(B) *A brief or appendix.* A brief or appendix is timely filed, however, if on or before the last day for filing, it is:

(i) mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; or

(ii) dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.

(C) *Inmate filing.* A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C.S. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(D) *Electronic filing.* A court of appeals may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.

(3) *Filing a motion with a judge.* If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge; the judge must note the filing date on the motion and give it to the clerk.

(4) *Clerk's refusal of documents.* The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.

(5) *Privacy Protection.* An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

(b) *Service of all papers required.* Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(c) *Manner of service.*

(1) Service may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail;

(C) by third-party commercial carrier for delivery within 3 days; or

(D) by electronic means, if the party being served consents in writing.

(2) If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(l)(D).

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received by the party served.

(d) *Proof of service.*

(1) A paper presented for filing must contain either of the following:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(B), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

(e) *Number of copies.* When these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case. (Amended December 1, 2002; amended December 1, 2006; amended December 1, 2007.)

Circuit Rule 25. Filing and service.

25.1 Facsimile Filing. The clerk may accept, for filing, papers sent by facsimile in situations the clerk determines are emergencies or that present other compelling circumstances.

25.2 Electronic Case Filing Procedures.

25.2.1 Electronic Filing. At the court's direction, the clerk will set an implementation date for an initial period of voluntary, and a subsequent date for mandatory, use of the court's electronic filing system. Thereafter, all cases will be assigned to the court's electronic filing system. Counsel must register as Filing Users under Rule 25.2.3 and comply with the court's electronic filing standards, posted separately on the court's website, www.ca5.uscourts.gov, unless excused for good cause. Non-incarcerated pro se litigants may request the clerk's permission to register as a Filing User, in civil cases only, under such conditions as the clerk may authorize.

Except as authorized in the electronic filing rules and standards, Filing Users must submit all briefs, motions, petitions for rehearing in PDF text, (not

scanned), format and in paper format as prescribed by the clerk, see 5th Cir. R. 30, 31, etc. Whenever possible, other documents, e.g., record excerpts, etc., should be in PDF text format, and in paper format as prescribed by the clerk. All paper filings must be identical to the electronic file(s). Upon the clerk's request, a Filing User must promptly provide an identical electronic version of any paper document previously filed in the same case.

25.2.2 Filing in Original Proceedings. Filing Users may be required to file case-initiating documents in original proceedings, e.g., mandamus, petitions for second and successive habeas corpus relief, petitions for review, etc., in paper format. Subsequent documents may be filed electronically and in paper format as prescribed by the clerk.

25.2.3 Filing Users: Eligibility, Registration, Passwords. All counsel not excused from filing electronically must register themselves, or any additional approved designee, as Filing Users of the court's electronic filing system. The clerk will define the registration requirements and continuing duty of counsel to keep their contact information current, see 5th Cir. R. 46.1, and will determine necessary training to receive Filing User registration.

Non-incarcerated pro se litigants granted Filing User status under Rule 25.2.1 will have Filing User status terminated as prescribed by the clerk, generally at the termination of the case. If a pro se party, permitted to register as a Filing User, retains an attorney, that counsel must advise the clerk.

A Filing User's registration constitutes consent to electronic service of all documents as provided in the Fed. R. App. P. and the 5th Cir. R.

Filing Users agree to protect the security of their passwords and immediately notify the PACER Service Center and the clerk if their password is compromised. Filing Users may be sanctioned for failure to comply with this provision.

Subject to a single judge's review, the clerk may terminate a Filing User's electronic filing privileges for abusing the system by an inordinate number of filings, filings of excessive size, or other failures to comply with the electronic filing rules and standards.

A Filing User may move to withdraw from participation in the electronic filing system for good cause shown.

25.2.4 Consequences of Electronic Filing. A Filing User's electronic transmission of a document to the electronic filing system consistent with these rules and the court's electronic filing standards, together with the court's transmission of a Notice of Docket Activity, constitutes filing of the document under the Fed. R. App. P. and 5th Cir. R., and constitutes entry of the document on the docket under Fed. R. App. P. 36 and 45(b). If a party must file a motion for leave to file, both the motion and document at issue must be submitted electronically and in identical paper form; the underlying document will be filed if the court so directs.

A Filing User must verify a document's legibility and completeness before filing it with the court. Except as authorized by the court's electronic filing rules and standards, documents the Filing User creates and files electronically must be in PDF text format. When a Filing User's document has been filed

electronically, the official record is the electronic document stored by the court, and the filing party is bound by the document as filed. Except for documents first filed in paper form and subsequently submitted electronically under 5th Cir. R. 25.2.2, an electronically filed document is deemed filed at the date and time stated on the court's Notice of Docket Activity.

Filing must be completed by 11:59 p.m. Central Time to be considered timely filed that day.

25.2.5 Service of Documents by Electronic Means. The court's electronic Notice of Docket Activity constitutes service of the filed document on all Filing Users. Parties who are not Filing Users must be served with a copy of any document filed electronically in accordance with the Fed. R. App. P. 25 and 5th Cir. R. 25 If the document is not available electronically, the filer must use an alternative method of service.

The court's electronic Notice of Docket Activity does not replace the certificate of service required by Fed. R. App. P. 25 (d).

25.2.6 Entry of Court-Issued Documents. Except as otherwise provided by rule or order, all of the court's orders, opinions, judgments, and proceedings relating to cases electronically filed will be filed in accordance with these rules, and will constitute entry on the docket under Fed. R. App. P. 36 and 45(b).

Any order or other court-issued document filed electronically does not require a signature of a judge or other court employee. An electronic order has the same force and effect as a paper copy of the order. Orders also may be entered as 'text-only' entries on the docket, without an attached document. Such orders are official and binding.

25.2.7 Attachments and Exhibits to Motions and Original Proceedings. Filing Users must submit all documents referenced as exhibits or attachments, in electronic form within any file size limits the clerk may prescribe, as well as any paper copies the clerk specifies. A Filing User must submit as exhibits or attachments only those excerpts of the referenced documents that are directly germane to the matter under consideration by the court. Excerpted material must be clearly and prominently identified as such. The clerk may require parties to file additional excerpts or the complete document.

25.2.8 Sealed Documents. A Filing User may move to file documents under seal in electronic form if permitted by law, and as authorized in the court's electronic filing standards. The court's order authorizing or denying the electronic filing of documents under seal may be filed electronically. Documents ordered placed under seal may be filed traditionally in paper or electronically, as authorized by the court. If filed traditionally, a paper copy of the authorizing order must be attached to the documents under seal and delivered to the clerk.

25.2.9 Retention Requirements. The Filing User must maintain in paper form documents filed electronically and requiring original signatures, other than that of the Filing User, for 3 years after the mandate or order closing the case issues. On request of the court, the Filing User must provide original documents for review.

25.2.10 Signatures. The user log-in and password required to submit documents in electronic form serve as the Filing User's signature on all

electronic documents filed with the court. They also serve as a signature for purposes of the Fed. R. App. P. 32(d) and 5th Cir. R. 28.5, and any other purpose for which a signature is required in connection with proceedings before the court.

The Filing User's name under whose log-in and password the document is submitted must be preceded by an 's" and be typed in the space where the signature otherwise would appear.

No Filing User or other person may knowingly permit or cause to permit a Filing User's log-in and password to be used by anyone other than an authorized agent of the Filing User.

Documents which require more than one party's signature must be filed electronically by:

submitting a scanned document containing all necessary signatures;

showing the consent of the other parties on the document; or

any other manner approved by the court.

Electronically represented signatures of all parties and Filing Users described above are presumed valid. If any party, counsel of record, or Filing User objects to the representation of his or her signature on an electronic document as described above, he or she must file a notice within 10 days setting forth the basis of the objection.

25.2.11 Notice of Court Orders and Judgment. The clerk will transmit electronically a Notice of Docket Activity to Filing Users in the case when entering an order or judgment. This electronic transmission constitutes the notice and service of the opinion required by Fed. R. App. P. 36(b) and 45(c). The clerk must give notice in paper form in accordance with those rules to a person who has not consented to electronic service.

25.2.12 Technical Failures. A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.

25.2.13 Public Access/Redaction of Personal Identifiers. Parties must refrain from including, or must partially redact where inclusion is necessary, certain personal data identifiers whether filed electronically or in paper form as prescribed in Fed. R. App. P. 25, Fed. R. Civ. P. 5.2(a), and Fed. R. Crim. P. 49.1. Responsibility for complying with the rules and redacting personal identifiers rests solely with counsel. The parties or their counsel may be required to certify compliance with these rules. The clerk will not review pleadings, and is not responsible for data redaction.

Parties wishing to file a document containing the personal data identifiers referenced above may:

file an un-redacted version of the document under seal, or

file a reference list under seal. The list must contain the complete personal data identifier(s) and the redacted identifier(s) used in its (their) place in the filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete personal data identifier. The reference list must be filed under seal, and may be amended as of right.

The court will retain the un-redacted version of the document or the reference list as part of the record. The court may require the party to file a redacted copy for the public file.

25.2.14 Hyperlinks. Electronically filed documents may contain the following types of hyperlinks:

Hyperlinks to other portions of the same document;

Hyperlinks to PACER that contains a source document for a citation;

Hyperlinks to documents already filed in any CM/ECF database;

Hyperlinks between documents that will be filed together at the same time;.

Hyperlinks that the clerk may approve in the future as technology advances.

Hyperlinks to cited authority may not replace standard citation format. Complete citations must be included in the text of the filed document.

A hyperlink, or any site to which it refers, will not be considered part of the record. Hyperlinks are simply convenient mechanisms for accessing material cited in a filed document. The court accepts no responsibility for, and does not endorse, any product, organization, or content at any hyperlinked site, or at any site to which that site might be linked. The court accepts no responsibility for the availability or functionality of any hyperlink.

25.2.15 Changes. The clerk may make changes to the standards for electronic filing to adapt to changes in technology or to facilitate electronic filing. Changes to the court's electronic filing standards will be posted on the court's internet website. (Amended Dec. 1, 2002; July 15, 2003; As amended Dec. 1, 2009.)

I.O.P.

Limits on recovery of mailing or commercial carrier delivery costs. See 5th Cir. R. 39.2.

FRAP 26. Computing and extending time.

(a) *Computing time.* The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) *Period Stated in Days or a Longer Unit.* When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) *Period Stated in Hours.* When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) *Inaccessibility of the Clerk's Office.* Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 26(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 26(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) *"Last Day" Defined.* Unless a different time is set by a statute, local rule, or court order, the last day ends:

(4) *"Last Day" Defined.* Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing in the district court, at midnight in the court's time zone;

(B) for electronic filing in the court of appeals, at midnight in the time zone of the circuit clerk's principal office;

(C) for filing under Rules 4(c)(1), 25(a)(2)(B), and 25(a)(2)(C) - and filing by mail under Rule 13(b) - at the latest time for the method chosen for delivery to the post office, third-party commercial carrier, or prison mailing system; and

(D) for filing by other means, when the clerk's office is scheduled to close.

(5) *"Next Day" Defined.* The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) *"Legal Holiday" Defined.* "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day;

(B) any day declared a holiday by the President or Congress; and

(C) for periods that are measured after an event, any other day declared a holiday by the state where either of the following is located: the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

(b) *Extending time.* For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:

(1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or

(2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

(c) *Additional time after service.* When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 days are

added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service. (Amended effective December 1, 2005; amended effective December 1, 2009.)

Circuit Rule 26. Computation and extension of time.

26.1 Computing Time. Except for briefs and record excerpts, all other papers, including petitions for rehearing, are not timely unless the clerk actually receives them within the time fixed for filing. Briefs and record excerpts are deemed filed on the day sent to the clerk electronically where permitted by 5th Cir. R. 30 and 31, by a third-party commercial carrier for delivery within 3 days, or on the day of mailing if the most expeditious form of delivery by mail is used. The additional 3 days after service by mail, by electronic means, or after delivery to a commercial carrier for delivery within 3 days referred to in Fed. R. App. P. 26(c), applies only to matters served by a party and not to filings with the clerk of such matters as petitions for rehearing under Fed. R. App. P. 40, petitions for rehearing en banc under Fed. R. App. P. 35, and bills of costs under Fed. R. App. P. 39.

26.2 Extensions of Time. The court requires timely filing of all papers within the time period allowed by the rules, without extensions of time, except for good cause. Appeals which are not processed timely will be dismissed for want of prosecution without further notice under 5th Cir. R. 42. If the parties or counsel waive their right to file a reply brief, they must immediately notify the clerk to expedite submitting the case to the court. (Amended Dec. 1, 2002; July 15, 2003; As amended Dec. 1, 2009.)

FRAP 26.1. Corporate disclosure statement.

(a) *Who must file.* Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(b) *Time for filing; supplemental filing.* A party must file the Rule 26.1(a) statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A party must supplement its statement whenever the information that must be disclosed under Rule 26.1(a) changes.

(c) *Number of copies.* If the Rule 26.1(a) statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case. (Amended December 1, 2002.)

Circuit Rule 26.1. Certificate of interested persons.

26.1.1 Corporate Disclosure Statement. The court uses a "Certificate of Interested Persons" in lieu of a Corporate Disclosure Statement. See 5th Cir. R. 28.2.1.

FRAP 27. Motions.

(a) *In general.*

(1) *Application for relief.* An application for an order or other relief is made by motion unless these rules prescribe another form. A motion must be in writing unless the court permits otherwise.

(2) *Contents of a motion.*

(A) *Grounds and relief sought.* A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it.

(B) *Accompanying documents.*

(i) Any affidavit or other paper necessary to support a motion must be served and filed with the motion.

(ii) An affidavit must contain only factual information, not legal argument.

(iii) A motion seeking substantive relief must include a copy of the trial court's opinion or agency's decision as a separate exhibit.

(C) *Documents barred or not required.*

(i) A separate brief supporting or responding to a motion must not be filed.

(ii) A notice of motion is not required.

(iii) A proposed order is not required.

(3) *Response.*

(A) *Time to file.* Any party may file a response to a motion; Rule 27(a)(2) governs its contents. The response must be filed within 10 days after service of the motion unless the court shortens or extends the time. A motion authorized by Rules 8, 9, 18, or 41 may be granted before the 10-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner.

(B) *Request for affirmative relief.* A response may include a motion for affirmative relief. The time to respond to the new motion, and to reply to that response, are governed by Rule 27(a)(3)(A) and (a)(4). The title of the response must alert the court to the request for relief.

(4) *Reply to response.* Any reply to a response must be filed within 7days after service of the response. A reply must not present matters that do not relate to the response.

(b) *Disposition of a motion for a procedural order.* The court may act on a motion for a procedural order — including a motion under Rule 26(b) — at any time without awaiting a response, and may, by rule or by order in a particular case, authorize its clerk to act on specified types of procedural motions. A party adversely affected by the court's, or the clerk's, action may file a motion to reconsider, vacate, or modify that action. Timely opposition filed after the motion is granted in whole or in part does not constitute a request to reconsider, vacate, or modify the disposition; a motion requesting that relief must be filed.

(c) *Power of a single judge to entertain a motion.* A circuit judge may act alone on any motion, but may not dismiss or otherwise determine an appeal or other proceeding. A court of appeals may provide by rule or by order in a particular case that only the court may act on any motion or class of motions. The court may review the action of a single judge.

(d) *Form of papers; page limits; and number of copies.*

(1) *Format.*

(A) *Reproduction.* A motion, response, or reply may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) *Cover.* A cover is not required but there must be a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed. If a cover is used, it must be white.

(C) *Binding.* The document must be bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open.

(D) *Paper size, line spacing, and margins.* The document must be on 8 ½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(E) *Typeface and type styles.* The document must comply with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6).

(2) *Page limits.* A motion or a response to a motion must not exceed 20 pages, exclusive of the corporate disclosure statement and accompanying documents authorized by Rule 27(a)(2)(B), unless the court permits or directs otherwise. A reply to a response must not exceed 10 pages.

(3) *Number of copies.* An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

(e) *Oral argument.* A motion will be decided without oral argument unless the court orders otherwise. (Amended effective December 1, 2005.)

Circuit Rule 27. Motions.

27.1 Clerk May Rule on Certain Motions. Under Fed. R. App. P. 27(b), the clerk has discretion to act on, in accordance with the standards set forth in the applicable rules, or to refer to the court, the procedural motions listed below. The clerk's action is subject to review by a single judge upon a motion for reconsideration made within the 14 or 45 day period set by Fed. R. App. P. 40.

27.1.1 To extend the time for: filing answers or replies to pending motions; paying filing fees; filing motions to proceed in forma pauperis; filing petitions for panel rehearing and rehearing en banc, and for reconsideration of single judge orders, for not longer than 14 days, 30 days if the applicant for extension is a prisoner proceeding pro se; filing briefs as permitted by 5th Cir. R. 31.4; filing bills of costs; and filing applications under the Equal Access to Justice Act.

27.1.2 To rule on motions to file briefs out of time.

27.1.3 To stay further proceedings in appeals.

27.1.4 To correct briefs or pleadings filed in this court at counsel's request.

27.1.5 To stay the issuance of mandates pending certiorari in civil cases only, for no more than 30 days, provided the court has not ordered the mandate issued earlier.

27.1.6 To reinstate appeals dismissed by the clerk.

27.1.7 To enter and issue consent decrees in labor board and other government agency review cases.

27.1.8 To enter CJA Form 20 orders continuing trial court appointment of counsel on appeal for purposes of compensation.

27.1.9 To consolidate appeals.

27.1.10 To withdraw appearances.

27.1.11 To supplement or correct records.

27.1.12 To incorporate records or briefs on former appeals.

27.1.13 To file reply or supplemental briefs in addition to the single reply brief permitted by Fed. R. App. P. 28(c) prior to submission to the court.

27.1.14 To file an amicus curiae brief under Fed. R. App. P. 29 (see 5th Cir. R. 29.4).

27.1.15 To enlarge the number of pages of optional contents in record excerpts.

27.1.16 To extend the length limits for: briefs under Fed. R. App. P. 32(a)(7) and 5th Cir. R. 32; petitions for rehearing en banc and panel rehearing under Fed. R. App. P. 35(b)(2), and 40(b); certificates of appealability and motions for permission to file second or successive habeas corpus applications under 28 U.S.C.S §§ 2254 and 2255, under 5th Cir. R. 22; petitions for permission to appeal under 5th Cir. R. 5; and petitions for mandamus and extraordinary writs under 5th Cir. R. 21.

27.1.17 To proceed in forma pauperis, see Fed. R. App. P. 24 and 28 U.S.C.S. § 1915;

27.1.18 To appoint counsel or to permit appointed counsel to withdraw;

27.1.19 To obtain transcripts at government expense.

27.2 Single Judge May Rule on Certain Motions. Pursuant to Fed. R. App. P. 27(c), any single judge of this court has discretion, subject to review by a panel upon a motion for reconsideration made within the 14 or 45 day period set forth in Fed. R. App. P. 40, to take appropriate action on the following procedural motions:

27.2.1 The motions listed in 5th Cir. R. 27.1 that have been referred to a single judge for initial action, or for single judge reconsideration of a ruling made by the clerk, but the judge is not limited to the time restrictions in 5th Cir. R. 27.1.1.

27.2.2 To permit interventions in agency proceedings pursuant to Fed. R. App. P. 15(d).

27.2.3 To act on applications for certificates of appealability under Fed. R. App. P. 22(b) and 28 U.S.C.S. § 2253 except for death penalty cases where a three judge panel must act.

27.2.4 To extend for good cause the times prescribed by the Federal Rules of Appellate Procedure or by the rules of this court except for enlarging the time for initiating an appeal, see Fed. R. App. P. 26(b).

27.2.5 To substitute parties under Fed. R. App. P. 43.

27.2.6 To exercise the power granted in Fed. R. App. P. 8 and 9, respecting stays, or injunctions, or releases in criminal cases pending appeal, and subject to the restrictions set out in those rules; and to exercise the power granted in Fed. R. App. P. 18, respecting stays pending review of agency decisions or orders, subject to the restrictions on the power of a single judge contained in that rule.

27.2.7 To stay the issuance of mandates or to recall same pending certiorari.

27.2.8 To expedite appeals.

27.2.9 To strike a nonconforming brief or record excerpts as provided in 5th Cir. R. 32.5 and to strike other papers not conforming to the Fed. R. App. P. and 5th Cir. R.

27.3 Emergency Motions in Cases Other Than Capital Cases. Parties should not file motions seeking emergency relief unless there is an emergency sufficient to justify disruption of the normal appellate process. In cases not governed by 5th Cir. R. 8.10, motions seeking relief before the expiration of 14 days after filing must, subject to the penalties of Fed. R. App. P. 46(c), be supported by good cause and must:

Be preceded by a telephone call to the clerk's office and to the offices of opposing counsel advising of the intent to file the emergency motion. If time does not permit the filing of the motion by hand delivery or by mail, the clerk may permit filing by facsimile or by other electronic means. In an extraordinary case, the clerk may permit the submission of an oral motion by telephone. If the motion is filed by means other than hand delivery or mail, counsel should also later file the motion by hand delivery or by mail.

Be labeled "Emergency Motion."

State the nature of the emergency and the irreparable harm the movant will suffer if the motion is not granted.

Certify that the facts supporting emergency consideration of the motion are true and complete.

Provide the date by which action is believed to be necessary.

Attach any relevant order or other ruling of the district court as well as copies of all relevant pleadings, briefs, memoranda, or other papers filed by all parties in the district court. If this cannot be done, counsel must state the reason that it cannot be done.

Be served on opposing counsel at the same time and, absent agreement to the contrary with opposing counsel, in the same manner as the emergency motion is filed with the court.

Be filed in the clerk's office by 2:00 p.m. on the day of filing.

27.4 Form of Motions. Parties or counsel must comply with the requirements of Fed. R. App. P. 27 including the length limits of Fed. R. App. P. 27(d)(2). Except for purely procedural matters, motions must include a certificate of interested persons as described in 5th Cir. R. 28.2.1. Where a single judge or

the clerk may act only an original and 1 copy need be filed. All motions requiring panel action require an original and 3 copies. All motions must state that the movant has contacted or attempted to contact all other parties and must indicate whether an opposition will be filed.

27.5 Motions To Expedite Appeal. Such motions are presented in the same manner as other motions. Only the court may expedite an appeal and only for good cause. If an appeal is expedited, the clerk will fix a briefing schedule unless a judge directs a specific date. (Amended Dec. 1, 2002; As amended Dec. 1, 2009.)

I.O.P.

General Standards for Ruling on Motions

5th Cir. R. 27 implements Fed. R. App. P. 27(b) and (c) and delegates to single Judges and the Clerk the authority to rule on specified motions, subject to review by the court. This I.O.P. provides the general sense of the court on the disposition of a variety of matters:

Briefs. — The court expects that all briefs will be filed timely. Motions for extension of time to file briefs are disfavored and should be made only in exceptional instances where "good cause" exists. No extension is automatic. If an extension is granted, it will be for the very least amount of time necessary, and except in the most unusually compelling circumstances, will not exceed 30 days in a criminal case, or 40 days in a civil case.

Litigants seeking to file briefs after the due date set in the briefing letter should understand that the court generally will not permit the brief's filing "out of time". However even in the unusual case where out of time filing is authorized, a brief generally will not be filed out of time more than 30 days beyond the original due date in a criminal case, or 40 days in a civil case.

Motions for Extension of Time to File Answers, Replies to Pending Motions or to Pay Filing Fees. — If such motions are granted, extensions generally will not exceed 30 days.

Reinstatement of Cases Dismissed by the Clerk. — The court normally will not reinstate a case dismissed by the clerk under 5th Cir. R. 27.1.6 unless:

The deficiency which caused the dismissal has been remedied; and

The motion for reinstatement is made as soon as reasonably possible and in any event within 45 days of dismissal.

Motions Panels. — Motions panels are drawn randomly from the active judges. These panels also operate as screening panels as discussed in the I.O.P. following 5th Cir. R. 34. The motions panels compositions are changed at the beginning of each court year to permit the judges to sit with other judges in screening and handling administrative motions.

Distribution

To Judges. — Motions requiring judges' consideration are assigned in rotation to all active judges on a routing log.

The clerk assembles a complete set of the motion papers, and any other necessary material and submits them with a routing form to the initiating judge. In single judge matters the initiating judge acts on the motion and returns it to the clerk with an appropriate order. For motions requiring panel action, a single set of papers is prepared, but the initiating judge transmits the file to the next judge with a recommendation. The second judge sends it on to the third judge, who returns the file and an appropriate order to the clerk.

Emergency Motions. — The clerk immediately assigns the matter to the next initiating judge in rotation on the administrative routing log and to the panel members. If the matter requires counsel to contact the initiating judge or panel members personally, the clerk will provide the names of the judges assigned the case, after getting approval from the initiating judge.

The motion papers are distributed as described above, except that a complete set, including any draft order, is forwarded to all members of the panel.

Motions After Assignment to Calendar. — After cases are assigned to the oral argument calendar, motions are circulated to the hearing panel rather than to the standard motions panels. The senior active judge on the panel is considered the initiating judge. The clerk enters orders responding to the motions on behalf of the panel until entry of the opinion.

Post-Decision Motions.

Extension of Time To File Petition for Rehearing or Leave To File Out of Time. — The clerk may act on or refer to the court a timely motion for an extension of time to file a petition for panel rehearing or for rehearing en banc for a period not longer than 14 days, 30 days if the applicant is a prisoner proceeding pro se. Motions for additional time beyond 14 or 30 days, or to file out of time, are submitted to the writing judge, unless he or she is a visiting judge. In that event the matter is referred to the senior active judge on the panel. If the senior active judge dissented, the matter is referred to the other active judge on the panel.

Stay or Recall of Mandate. — The clerk or a single judge, as appropriate, decides a motion for stay or recall of mandate pending action on a petition for writ of certiorari and routes and disposes of it in the same manner as in the preceding paragraph. (See 5th Cir. R. 27.1.5, 27.2.7, and 41).

Motions To Amend, Correct, or Settle the Judgment. — These motions are referred to the writing judge with copies to the panel members.

Remand from Supreme Court of the United States. — Remands from the Supreme Court of the United States are sent to the original panel for disposition when the Supreme Court's judgment is received. Counsel does not need to file a formal motion.

FRAP 28. Briefs.

(a) *Appellant's brief.* The appellant's brief must contain, under appropriate headings and in the order indicated:

(1) a corporate disclosure statement if required by Rule 26.1;

(2) a table of contents, with page references;

(3) a table of authorities — cases (alphabetically arranged), statutes, and other authorities — with references to the pages of the brief where they are cited;

(4) a jurisdictional statement, including:

(A) the basis for the district court's or agency's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(C) the filing dates establishing the timeliness of the appeal or petition for review; and

(D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis;

(5) a statement of the issues presented for review;

(6) a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (see Rule 28 (e));

(7) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

(8) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

(9) a short conclusion stating the precise relief sought; and

(10) the certificate of compliance, if required by Rule 32(a)(7).

(b) *Appellee's Brief.* The appellee's brief must conform to the requirements of Rule 28(a)(1)-(8) and (10), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case; and

(4) the statement of the standard of review.

(c) *Reply brief.* The appellant may file a brief in reply to the appellee's brief. Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, and a table of authorities - cases (alphabetically arranged), statutes, and other authorities - with references to the pages of the reply brief where they are cited.

(d) *References to parties.* In briefs and at oral argument, counsel should minimize use of the terms "appellant" and "appellee." To make briefs clear,

counsel should use the parties' actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore."

(e) *References to the Record.* References to the parts of the record contained in the appendix filed with the appellant's brief must be to the pages of the appendix. If the appendix is prepared after the briefs are filed, a party referring to the record must follow one of the methods detailed in Rule 30(c). If the original record is used under Rule 30(f) and is not consecutively paginated, or if the brief refers to an unreproduced part of the record, any reference must be to the page of the original document. For example:

- Answer p. 7;
- Motion for judgment p. 2;
- Transcript p. 231.

Only clear abbreviations may be used. A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

(f) *Reproduction of statutes, rules, regulations, etc.* If the court's determination of the issues presented requires the study of statutes, rules, regulations, etc., the relevant parts must be set out in the brief or in an addendum at the end, or may be supplied to the court in pamphlet form.

(e) *References to the record.* References to the parts of the record contained in the appendix filed with the appellant's brief must be to the pages of the appendix. If the appendix is prepared after the briefs are filed, a party referring to the record must follow one of the methods detailed in Rule 30(c). If the original record is used under Rule 30(f) and is not consecutively paginated, or if the brief refers to an unreproduced part of the record, any reference must be to the page of the original document. For example:

- Answer p. 7;
- Motion for Judgment p. 2;
- Transcript p. 231.

Only clear abbreviations may be used. A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

(f) *Reproduction of statutes, rules, regulations, etc.* If the court's determination of the issues presented requires the study of statutes, rules, regulations, etc., the relevant parts must be set out in the brief or in an addendum at the end, or may be supplied to the court in pamphlet form.

(g) *[Reserved].*

(h) *[Reserved].*

(i) *Briefs in a case involving multiple appellants or appellees.* In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs.

(j) *Citation of supplemental authorities.* If pertinent and significant authorities come to a party's attention after the party's brief has been filed — or after oral argument but before decision — a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited. (Amended effective December 1, 2005; amended December 1, 2013.)

Circuit Rule 28. Briefs.

28.1 Briefs — Technical Requirements. The technical requirements for permissible typefaces, paper size, line spacing, and length of briefs are found in Fed. R. App. P. and 5th Cir. R. 32.

28.2 Briefs — Contents.

28.2.1 Certificate of Interested Persons. The certificate of interested persons required by this rule is broader in scope than the corporate disclosure statement contemplated in Fed. R. App. P. 26.1. The certificate of interested persons provides the court with additional information concerning parties whose participation in a case may raise a recusal issue. A separate corporate disclosure statement is not required. Counsel and unrepresented parties will furnish a certificate for all private (non-governmental) parties, both appellants and appellees, which must be incorporated on the first page of each brief before the table of contents or index, and which must certify a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations, or other legal entities who or which are financially interested in the outcome of the litigation. If a large group of persons or firms can be specified by a generic description, individual listing is not necessary. Each certificate must also list the names of opposing law firms and/or counsel in the case. The certificate must include all information called for by Fed. R. App. P. 26.1(a). Counsel and unrepresented parties must supplement their certificates of interested persons whenever the information that must be disclosed changes.

(a) Each certificate must list all persons known to counsel to be interested, on all sides of the case, whether or not represented by counsel furnishing the certificate. Counsel has the burden to ascertain and certify the true facts to the court.

(b) The certificate must be in the following form:

(1) Number and Style of Case;

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

(Here list names of all such persons and entities and identify their connection and interest.)

_____

Attorney of record for _____

28.2.2 Record References. Every assertion in briefs regarding matter in the record must be supported by a reference to the page number of the original record, whether in paper or electronic form, where the matter is found using the record citation form as directed by the Clerk of Court. [Link to format in Appendix]

28.2.3 Request for Oral Argument. Counsel for appellant must include in a preamble to appellant's principal brief a short statement why oral argument would be helpful, or a statement that appellant waives oral argument. Appellee's counsel must likewise include in appellee's brief a statement why oral argument is or is not needed. The court will give these statements due, though not controlling, weight in determining whether to hold oral argument. See Fed. R. App. P. 34(a) and (f) and 5th Cir. R. 34.2.

28.3 Brief — Order of Contents. The order of contents of the brief is governed by Fed. R. App. P. 28 and this rule and shall be as follows:

(a) Certificate of interested persons required by 5th Cir. R. 28.2.1;

(b) Statement regarding oral argument required by 5th Cir. R. 28.2.3 (See Fed. R. App. P. 34(a)(1);

(c) A table of contents, with page references (see Fed. R. App. P. 28 (a)(2));

(d) A table of authorities (see Fed. R. App. P. 28(a)(3));

(e) A jurisdictional statement as required by Fed. R. App. P. 28(a)(4)(A) through (D);

(f) A statement of issues presented for review (see Fed. R. App. P. 28 (a)(5));

(g) A concise statement of the case setting out the facts relevant to the issues submitted for review (see FED. R. APP. P. 28(a)(6));

(h) A summary of the argument (see FED. R. APP. P. 28(a)(7));

(i) The argument (see FED. R. APP. P. 28(a)(8));

(j) A short conclusion stating the precise relief sought (see FED. R. APP. P. 28 (a)(9));

(k) A signature of counsel or a party as required by FED. R. APP. P. 32(d);

(*l*) A certificate of service in the form required by FED. R. APP. P. 25;

(m) A certificate of compliance if required by FED. R. APP. P. 32(a)(7) and 5TH CIR. R. 32.3. (see FED. R. APP. P. 28(a)(10));

28.4 Supplemental Briefs. The rules do not permit the filing of supplemental briefs without leave of court, but there are some occasions, particularly after a case is orally argued or submitted on the summary calendar, where the court will call for supplemental briefs on particular issues. Also, where intervening decisions or new developments should be brought to the court's attention, counsel may direct a letter, not a supplemental brief, to the clerk with citations and succinct comment. See Fed. R. App. P. 28(j). If a new case is not reported, copies of the decision should be appended. The letter must be filed in 4 copies, and served on opposing counsel.

28.5 Signing the Brief. See Fed. R. App. P. 32(d). The signature requirement is interpreted broadly, and the attorney of record may designate another person to sign the brief for him or her. Where counsel for a particular party reside in different locations, it is not necessary to incur the expense of sending the brief from one person to another for multiple signatures.

28.6 Pro Se Briefs. Unless specifically directed by court order, pro se motions, briefs or correspondence will not be filed if the party is represented by counsel.

28.7 Citation to Unpublished Opinions, Orders, etc. Fed. R. App. P. 32.1(a) permits citation to unpublished judicial dispositions. Parties citing to such dispositions must comply with Fed. R. App. P. 32.1(b). If a party does not need to submit a copy of an unpublished disposition, the party must provide a citation to the disposition in a publicly accessible electronic database. (Amended Dec. 1, 2002; July 15, 2003; Dec. 1, 2005; Dec. 1, 2006; Dec. 1, 2007; As amended Dec. 1, 2009; amended December 1, 2013.)

I.O.P.

Miscellaneous Brief Information

(A) *Acknowledgment of Briefs.* — The clerk does not acknowledge the filing of briefs unless counsel or a party makes a special request.

(B) *Sample Briefs and Record Excerpts.* — Upon request, the clerk may loan sample briefs and record excerpts to counsel and non-incarcerated pro se litigants. Because pro se prisoner briefs are not held to the same rigid standards as other briefs, copies of briefs are generally not sent to prisoners. Instead other informational material may be sent. Postage fees may be required before the materials are sent.

(C) *Checklist Available.* — A copy of the checklist used by the clerk in examining briefs is available on request.

FRAP 28.1. Cross-Appeals.

(a) *Applicability.* This rule applies to a case in which a cross-appeal is filed. Rules 28(a)-(c), 31(a)(1), 32(a)(2), and 32(a)(7)(A)-(B) do not apply to such a case, except as otherwise provided in this rule.

(b) *Designation of Appellant.* The party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30 and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by the parties' agreement or by court order.

(c) *Briefs.* In a case involving a cross-appeal:

(1) *Appellant's Principal Brief.* The appellant must file a principal brief in the appeal. That brief must comply with Rule 28(a).

(2) *Appellee's Principal and Response Brief.* The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That appellee's brief must comply with Rule 28(a), except that the brief need not include a statement of the case unless the appellee is dissatisfied with the appellant's statement.

(3) *Appellant's Response and Reply Brief.* The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same

brief, reply to the response in the appeal. That brief must comply with Rule 28(a)(2)-(8) and (10), except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

(A) the jurisdictional statement;

(B) the statement of the issues;

(C) the statement of the case; and

(D) the statement of the standard of review.

(4) *Appellee's Reply Brief.* The appellee may file a brief in reply to the response in the cross-appeal. That brief must comply with Rule 28(a)(2)-(3) and (10) and must be limited to the issues presented by the cross-appeal.

(5) *No Further Briefs.* Unless the court permits, no further briefs may be filed in a case involving a cross-appeal.

(d) *Cover.* Except for filings by unrepresented parties, the cover of the appellant's principal brief must be blue; the appellee's principal and response brief, red; the appellant's response and reply brief, yellow; the appellee's reply brief, gray; an intervenor's or amicus curiae's brief, green; and any supplemental brief, tan. The front cover of a brief must contain the information required by Rule 32(a)(2).

(e) *Length.*

(1) *Page Limitation.* Unless it complies with Rule 28.1(e)(2) and (3), the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) *Type-Volume Limitation.*

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if:

(i) it contains no more than 14,000 words; or

(ii) it uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if:

(i) it contains no more than 16,500 words; or

(ii) it uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in Rule 28.1(e)(2)(A).

(3) *Certificate of Compliance.* A brief submitted under Rule 28.1(e)(2) must comply with Rule 32(a)(7)(C).

(f) *Time to Serve and File a Brief.* Briefs must be served and filed as follows:

(1) the appellant's principal brief, within 40 days after the record is filed;

(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;

(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and

(4) the appellee's reply brief, within 14 days after the appellant's response and reply brief is served, but at least 7 days before argument unless the court, for good cause, allows a later filing. (Adopted effective December 1, 2005; amended effective December 1, 2009; amended effective December 1, 2013.)

FRAP 29. Brief of an Amicus Curiae.

(a) *When permitted.* The United States or its officer or agency, or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

(b) *Motion for leave to file.* The motion must be accompanied by the proposed brief and state:

(1) the movant's interest; and

(2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

(c) *Contents and form.* An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. An amicus brief need not comply with Rule 28, but must include the following:

(1) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;

(2) a table of contents, with page references;

(3) a table of authorities — cases (alphabetically arranged), statutes and other authorities — with references to the pages of the brief where they are cited;

(4) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(5) unless the amicus curiae is one listed in the first sentence of Rule 29(a), a statement that indicates whether:

(A) a party's counsel authored the brief in whole or in part;

(B) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief;

(C) a person - other than the amicus curiae, its members, or its counsel - contributed money that was intended to fund preparing or submitting the brief and, if so identifies each such person;

(6) argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

(7) a certificate of compliance, if required by Rule 32(a)(7).

(d) *Length.* Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(e) *Time for filing.* An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

(f) *Reply brief.* Except by the court's permission, an amicus curiae may not file a reply brief.

(g) *Oral argument.* An amicus curiae may participate in oral argument only with the court's permission. (Amended effective December 1, 2010.)

Circuit Rule 29. Brief of an Amicus Curiae.

29.1 Time for Filing Motion. Those wishing to file an amicus curiae brief should file a motion within 7 days after the filing of the principal brief of the party whose position the amicus brief will support.

29.2 Contents and Form. Briefs filed under this rule must comply with the applicable Fed. R. App. P. provisions and with 5th Cir. R. 31 and 32. The brief must include a supplemental statement of interested parties, if necessary to fully disclose all those with an interest in the amicus brief. The brief should avoid the repetition of facts or legal arguments contained in the principal brief and should focus on points either not made or not adequately discussed in those briefs. Any non-conforming brief may be stricken, on motion or sua sponte.

29.3 Length of Briefs. See Fed. R. App. P. 29(d).

29.4 Denial of Amicus Curiae Status. After a panel opinion is issued, amicus curiae status will not be permitted if the allowance would result in the disqualification of any member of the panel or of the en banc court.

I.O.P.

See also 5th Cir. R. 31.2.

FRAP 30. Appendix to the briefs.

(a) *Appellant's responsibility.*

(1) *Contents of the appendix.* The appellant must prepare and file an appendix to the briefs containing:

(A) the relevant docket entries in the proceeding below;

(B) the relevant portions of the pleadings, charge, findings, or opinion;

(C) the judgment, order, or decision in question; and

(D) other parts of the record to which the parties wish to direct the court's attention.

(2) *Excluded material.* Memoranda of law in the district court should not be included in the appendix unless they have independent relevance. Parts of the record may be relied on by the court or the parties even though not included in the appendix.

(3) *Time to file; number of copies.* Unless filing is deferred under Rule 30(c), the appellant must file 10 copies of the appendix with the brief and must serve one copy on counsel for each party separately represented. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number.

(b) *All parties' responsibilities.*

(1) *Determining the contents of the appendix* . The parties are encouraged to agree on the contents of the appendix. In the absence of an agreement, the appellant must, within 14 days after the record is filed, serve on the appellee

a designation of the parts of the record the appellant intends to include in the appendix and a statement of the issues the appellant intends to present for review. The appellee may, within 14 days after receiving the designation, serve on the appellant a designation of additional parts to which it wishes to direct the court's attention. The appellant must include the designated parts in the appendix. The parties must not engage in unnecessary designation of parts of the record, because the entire record is available to the court. This paragraph applies also to a cross-appellant and a cross-appellee.

(2) *Costs of appendix.* Unless the parties agree otherwise, the appellant must pay the cost of the appendix. If the appellant considers parts of the record designated by the appellee to be unnecessary, the appellant may advise the appellee, who must then advance the cost of including those parts. The cost of the appendix is a taxable cost. But if any party causes unnecessary parts of the record to be included in the appendix, the court may impose the cost of those parts on that party. Each circuit must, by local rule, provide for sanctions against attorneys who unreasonably and vexatiously increase litigation costs by including unnecessary material in the appendix.

(c) *Deferred appendix.*

(1) *Deferral until after briefs are filed.* The court may provide by rule for classes of cases or by order in a particular case that preparation of the appendix may be deferred until after the briefs have been filed and that the appendix may be filed 21 days after the appellee's brief is served. Even though the filing of the appendix may be deferred, Rule 30(b) applies; except that a party must designate the parts of the record it wants included in the appendix when it serves its brief, and need not include a statement of the issues presented.

(2) *References to the record.*

(A) If the deferred appendix is used, the parties may cite in their briefs the pertinent pages of the record. When the appendix is prepared, the record pages cited in the briefs must be indicated by inserting record page numbers, in brackets, at places in the appendix where those pages of the record appear.

(B) A party who wants to refer directly to pages of the appendix may serve and file copies of the brief within the time required by Rule 31(a), containing appropriate references to pertinent pages of the record. In that event, within 14 days after the appendix is filed, the party must serve and file copies of the brief, containing references to the pages of the appendix in place of or in addition to the references to the pertinent pages of the record. Except for the correction of typographical errors, no other changes may be made to the brief.

(d) *Format of the appendix.* The appendix must begin with a table of contents identifying the page at which each part begins. The relevant docket entries must follow the table of contents. Other parts of the record must follow chronologically. When pages from the transcript of proceedings are placed in the appendix, the transcript page numbers must be shown in brackets immediately before the included pages. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) should be omitted.

(e) *Reproduction of exhibits.* Exhibits designated for inclusion in the appendix may be reproduced in a separate volume, or volumes, suitably indexed. Four copies must be filed with the appendix, and one copy must be served on counsel for each separately represented party. If a transcript of a proceeding before an administrative agency, board, commission, or officer was used in a district-court action and has been designated for inclusion in the appendix, the transcript must be placed in the appendix as an exhibit.

(f) *Appeal on the original record without an appendix.* The court may, either by rule for all cases or classes of cases or by order in a particular case, dispense with the appendix and permit an appeal to proceed on the original record with any copies of the record, or relevant parts, that the court may order the parties to file.

Circuit Rule 30. Appendix to the briefs.

30.1 Records on Appeal/Record Excerpts/Appendix — Appeals from District Courts, the Tax Court, and Agencies. Appeals from district courts and the Tax Court are decided on the original record on appeal (ROA). The clerk is authorized to require the party receiving the ROA to pay reasonable shipping costs as a condition of receiving the record. Moreover, counsel and unrepresented parties must review the ROA within 20 days of dispatch from the clerk's office and advise electronically or in writing both the appropriate District Court (or the Tax Court, if appropriate) and Fifth Circuit clerk's offices of any errors in, or omissions from, the ROA. Failure to comply may result in a denial of any requested extension of time to file a brief due to an alleged error in, or incomplete ROA. Record excerpts are filed in lieu of the appendix prescribed by Fed. R. App. P. 30. Petitions for review or enforcement of agency orders are governed by 5th Cir. R. 30.2, but parties may be required to pay reasonable shipping costs, and are responsible for timely review of the record and the notification requirements set out above.

30.1.1 Purpose. The record excerpts are intended primarily to assist the judges in making the screening decision on the need for oral argument and in preparing for oral argument. Counsel need excerpt only those parts of the record that will assist in these functions.

30.1.2 Filing. Four paper copies of excerpts of the district court record must accompany the appellant's brief, see 5th Cir. R. 30.1.4 and 30.1.5. If exempt from electronic filing under 5th Cir. R. 25.2, all appellants represented by counsel must file an electronic copy of the record excerpts on a CD, computer diskette, or such other electronic medium as the clerk may authorize. The electronic copy must be in a single Portable Document Format (PDF) file; contain nothing other than the record excerpts; and have as the first page of the electronic copy an index to the contents. If submitted on a CD, diskette, or other authorized physical media, the electronic version must have a label containing the case name and docket number and state "Record Excerpts." The appellant must serve a paper and electronic copy of the excerpts on counsel for each of the parties separately represented; a paper copy on any party

proceeding pro se, and an electronic copy, if the pro se party is not an inmate confined in an institution. The appellee may similarly submit and serve additional record excerpts with the appellee's principal brief, with the required copies furnished to the clerk accompanying the appellee's brief.

30.1.3 Prisoner Petitions Without Representation by Counsel. Prisoners without counsel are not required to prepare and file record excerpts.

30.1.4 Mandatory Contents. The record excerpts must contain copies of the following portions of the district court record:

(a) The docket sheet;

(b) The notice of appeal;

(c) The indictment in criminal cases;

(d) The jury's verdict in all cases;

(e) The judgment or interlocutory order appealed;

(f) Any other orders or rulings sought to be reviewed;

(g) Any relevant magistrate judge's report and recommendation;

(h) Any supporting opinion or findings of fact and conclusions of law filed, or transcript pages of any such delivered orally; and

(i) A certificate of service complying with Fed. R. App. P. 25.

30.1.5 Optional Contents. The record excerpts may include those parts of the record, referred to in the briefs including:

(a) Essential pleadings or relevant portions thereof;

(b) The parts of the Fed. R. Civ. P. 16(e) pretrial order relevant to any issue on appeal;

(c) Any jury instruction given or refused that presents an issue on appeal, together with any objection and the court's ruling, and any other relevant part of the jury charge;

(d) Findings and conclusions of the administrative law judge, if the appeal is of a court order reviewing an administrative agency determination;

(e) A copy of the relevant pages of the transcript when the appeal challenges the admission or exclusion of evidence or any other interlocutory ruling or order; and

(f) The relevant parts of any written exhibit (including affidavits) that present an issue on appeal.

30.1.6 Length. The optional contents of the record excerpts must not exceed 40 pages unless authorized by the court.

30.1.7 Form. The record excerpts must:

(a) Have a numbered table of contents, with citation to the record, beginning with the lower court docket sheet;

(b) Be on letter-size, light paper, reproduced by any process that results in a clear black image. Care must be taken to reproduce fully the document filing date column on the docket sheet;

(c) Be tabbed to correspond to the numbers assigned in the table of contents;

(d) Be bound to expose fully the filing date columns and allow the document to lie reasonably flat when opened. The record excerpts must have a durable white cover conforming to Fed. R. App. P. 32(a)(2), except that it will be denominated "RECORD EXCERPTS."

The documents constituting the record excerpts do not need to be certified, but if the clerk's "filed" markings are either absent or not clearly legible, the accurate filing information must be typed or written thereon.

30.1.8. Nonconforming record excerpts. Record excerpts which do not conform to the requirements of this rule will be filed, but must be corrected within the time directed by the clerk. Failure to file corrected record excerpts may result in their being stricken and imposition of sanctions, under 5th Cir. R. 32.5.

30.2 Appendix — Agency Review Proceedings. Petitions for review or enforcement of orders of an administrative agency, board, commission or officer must proceed on the original record on review,without a Fed. R. App. P. 30 required appendix. If a party requests use of the original record, the clerk may require payment of reasonable shipping costs, and the party is responsible for timely review and notification to the agency and the Fifth Circuit clerk's office of any record deficiencies, see 5th Cir. R. 30.1.

(a) If a certified list of documents comprising the record is filed in lieu of the formal record, petitioner must prepare and file with the court and serve on the agency, board, or commission a copy of the portions of the record relied upon by the parties in their briefs. The list of documents must be suitably covered, numbered, and indexed and filed within 21 days of the filing of respondent's brief.

(b) Except in review proceedings covered by 5th Cir. R. 15.3, at the time of filing petitioner's brief, petitioner must file separately 4 copies of any order sought to be reviewed and any supporting opinion, findings of fact, or conclusions of law filed by the agency, board, commission, or officer. (Amended December 1, 2007; as amended December 1, 2009.)

FRAP 31. Serving and filing briefs.

(a) *Time to serve and file a brief.*

(1) The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within 14 days after service of the appellee's brief but a reply brief must be filed at least 7 days before argument, unless the court, for good cause, allows a later filing.

(2) A court of appeals that routinely considers cases on the merits promptly after the briefs are filed may shorten the time to serve and file briefs, either by local rule or by order in a particular case.

(b) *Number of copies.* Twenty-five copies of each brief must be filed with the clerk and 2 copies must be served on each unrepresented party and on counsel for each separately represented party. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on each unrepresented party and on counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number.

(c) *Consequence of failure to file.* If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal. An appellee who fails to file a brief will not be heard at oral argument unless the court grants permission.

Circuit Rule 31. Filing and service of a brief.

31.1 Briefs — Number of Copies; Computer Generated Briefs. Only 7 paper copies of briefs need be filed. Where a party is represented by counsel who is exempt from electronic filing under 5th Cir. R. 25.2, and counsel generates his or her brief by computer, the party also must submit an electronic version of the brief to the court. The filing party must serve unrepresented parties and counsel for separately represented parties in accordance with Fed. R. App. P. 31(b), and also must serve an electronic version of the brief on each party separately represented. However, the parties may agree in writing to waive service of paper copies of the brief and to be served with an electronic copy only. The electronic copy of the brief must be filed on a CD, computer diskette, or such other electronic medium as the clerk may authorize.

The electronic version must:

be prepared in a single Portable Document Format (PDF) file. (Briefs scanned into PDF are not acceptable);

contain nothing other than the brief;

have as the first page of the electronic file a brief cover page as required by Fed. R. App. P. 32(a)(2).

If submitted on a CD, diskette, or other authorized physical media, the electronic version must have a label containing the case name and docket number, and identifying the brief as the appellant's, appellee's, etc.

The proof of service must comply with Fed. R. App. P. 25(d)(1)(B) & (2).

31.2 Briefs — Time for Filing Briefs of Intervenors or Amicus Curiae. The time for filing the brief of the intervenor or amicus is extended until 7 days after the filing of the principal brief of the party supported by the intervenor or amicus.

31.3 Briefs — Time for Mailing or Delivery to a Commercial Carrier. The appellant must send his or her brief to the clerk not later than 40 days after the date of the briefing notice. Pursuant to Fed. R. App. P. 26(c), the appellee has 33 days from the appellant's date of the certificate of service to place the appellee's brief in the mail, file it with the clerk electronically where permitted, or to give it to a third-party commercial carrier for delivery within 3 calendar days. This rule may not be combined with the additional time provisions of Fed. R. App. P. 26(c) to give the appellee 36 days to file a brief. The certificate of service required by Fed. R. App. P. 25(d) is placed in the brief as specified in 5th Cir. R. 28.3, and must be dated. See 5th Cir. R. 39.2 for limitations on recovery of certain mailing and commercial delivery costs.

31.4 Briefs — Time for Filing.

31.4.1 General Provisions. The court expects briefs to be filed timely and without extensions in the vast majority of cases. No extensions are automatic,

even where the request is unopposed. Any requests for extensions should be made sparingly. No extension can be granted without good cause shown as required by Fed. R. App. P. 26(b), or without meeting the additional requirements contained in the 5th Cir. R.

(a) A request for extension should be made as soon as it is reasonably possible to foresee the need for the extension. The clerk must receive a request for extension at least 7 days before the due date, unless the movant demonstrates, in detail, that the facts that form the basis of the motion either did not exist earlier or were not and with due diligence could not have been known earlier.

(b) As specified in 5th Cir. R. 27.1, the movant must indicate that all other parties have been contacted and whether the motion is opposed. Movants should request only as much time as is absolutely needed. The pendency of a motion for extension does not toll the time for compliance.

31.4.2 Grounds for Extensions. As justification for extensions, generalities, such as that the purpose of the motion is not for delay or that counsel is too busy, are not sufficient. Grounds that may merit consideration for extensions are, without limitation, the following, which must be set forth if claimed as a reason in any motion for an extension beyond 30 days:

(a) Engagement of counsel in other litigation, provided such litigation is identified by caption, number, and court, and there is set forth:

(1) A description of any effort taken to defer the other litigation and of any ruling thereon;

(2) An explanation of why other litigation should receive priority over the case at hand; and

(3) Other relevant circumstances, including why other associated counsel cannot prepare the brief or relieve the movant's counsel of the other litigation.

(b) The matter is so complex that an adequate brief cannot reasonably be prepared when due.

(c) Extreme hardship will result unless an extension is granted, in which event the nature of the hardship must be set forth in detail.

31.4.3 Levels of Extensions. There are two levels of extensions: a Level 1 extension of 1-30 days from the original due date; and a Level 2 extension of more than 30 days from the original due date.

31.4.3.1 Level 1 Extensions. The clerk is authorized to act on or refer to the court Level 1 extensions. The court prefers that an unopposed request be made by telephone, but it may be by written motion or letter. When making the request, the movant must explain what good cause exists for the extension. If the extension is granted by telephone, the movant will immediately send a confirming letter to the clerk, with copies to all parties.

An opposed request for a Level 1 extension must be made by written motion setting forth why there is good cause. The motion must state the initial due date, whether any other extension has been granted, the length of the requested extension, and which parties have expressed opposition.

31.4.3.2 Level 2 Extensions. The clerk is authorized to act on or refer to the court Level 2 extensions. The request must be made by written motion, with

copies to all parties, stating the initial due date, whether any other extension has been granted, the length of the requested extension, and whether the motion is opposed.

More than ordinary good cause is required for a Level 2 extension, and Level 2 extensions will be granted only under the most extraordinary of circumstances. The movant must demonstrate diligence and substantial need and must show in detail what special circumstances exist that make a Level 1 extension insufficient.

31.4.4. Extensions for Reply Briefs. The court greatly disfavors all extensions of time for filing reply briefs. The court assumes that the parties have had ample opportunity to present their arguments in their initial briefs and that extensions for reply briefs only delay submission of the case to the court. (Amended Dec. 1, 2002; July 15, 2003; Nov. 1, 2004; Dec. 1, 2007; As amended Dec. 1, 2009.)

I.O.P.

The court continues to receive a large number of motions requesting extensions of time to file briefs, or to file briefs out of time, which are considered extension requests. The majority of these motions were by counsel, and frequently were made in direct criminal appeals which have the longest average processing time from filing the notice of appeal to filing the last brief. To assure that this court decides cases more expeditiously, the court's goals are to: 1) Reduce the number of motions to extend time to file briefs; and 2) To shorten the amount of time granted. In general and absent the most compelling of reasons, no more than 30 days extension of time will be granted in criminal cases and no more than 40 days extension of time will be granted in civil cases.

FRAP 32. Form of briefs, appendices, and other papers.

(a) *Form of a brief.*

(1) *Reproduction.*

(A) A brief may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) Text must be reproduced with a clarity that equals or exceeds the output of a laser printer.

(C) Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original; a glossy finish is acceptable if the original is glossy.

(2) *Cover.* Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green; any reply brief, gray; and any supplemental brief, tan. The front cover of a brief must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

(C) the title of the case (see Rule 12(a));

(D) the nature of the proceeding (e.g., Appeal, Petition for Review) and the name of the court, agency, or board below;

(E) the title of the brief, identifying the party or parties for whom the brief is filed; and

(F) the name, office address, and telephone number of counsel representing the party for whom the brief is filed.

(3) *Binding.* The brief must be bound in any manner that is secure, does not obscure the text, and permits the brief to lie reasonably flat when open.

(4) *Paper size, line spacing, and margins.* The brief must be on 8½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(5) *Typeface.* Either a proportionally spaced or a monospaced face may be used.

(A) A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger.

(B) A monospaced face may not contain more than 10½ characters per inch.

(6) *Type styles.* A brief must be set in a plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.

(7) *Length.*

(A) *Page limitation.* A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B) and (C).

(B) *Type-volume limitation.*

(i) A principal brief is acceptable if:

- it contains no more than 14,000 words; or
- it uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type volume specified in Rule 32(a)(7)(B)(i).

(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation

(C) *Certificate of compliance.*

(i) A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

- the number of words in the brief; or
- the number of lines of monospaced type in the brief.

(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rules 28.1(e)(3) and 32(a)(7)(C)(i).

(b) *Form of an appendix.* An appendix must comply with Rule 32(a)(1),(2),(3), and (4), with the following exceptions:

(1) The cover of a separately bound appendix must be white.

(2) An appendix may include a legible photocopy of any document found in the record or of a printed judicial or agency decision.

(3) When necessary to facilitate inclusion of odd-sized documents such as technical drawings, an appendix may be a size other than 8½ by 11 inches, and need not lie reasonably flat when opened.

(c) *Form of other papers.*

(1) *Motion.* The form of a motion is governed by Rule 27(d).

(2) *Other papers.* Any other paper, including a petition for panel rehearing and a petition for hearing or rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

(A) a cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2). If a cover is used, it must be white.

(B) Rule 32(a)(7) does not apply.

(d) *Signature.* Every brief, motion, or other paper filed with the court must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys.

(e) *Local Variation.* Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule. (Amended effective December 1, 2005.)

Circuit Rule 32. Form of briefs, the appendix and other papers.

32.1 Typeface. Must comply with Fed. R. App. P. 32(a)(5), except that footnotes may be 12 point or larger in proportionally spaced typeface, or 12½ characters per inch or larger in monospaced typeface.

32.2 Type Volume Limitations. See Fed. R. App. P. 32(a)(7)(B)(iii), and for cross-appeals Fed. R. App. P. 28.1(e). The certificate of interested parties does not count toward the limitation.

32.3 Certificate of Compliance. See Form 6 in the Appendix of Forms to the Fed. R. App. P. A material misrepresentation in the certificate of compliance may result in striking the brief and in sanctions against the person signing the brief.

32.4 Motions for Extra-Length Briefs. A motion to file a brief in excess of the page length or word-volume limitations must be filed at least 10 days in advance of the brief's due date. The court looks upon such motions with great disfavor and will grant them only for extraordinary and compelling reasons. If a motion to file an extra-length brief is submitted, a draft copy of the brief must be submitted with the motion.

32.5 Rejection of Briefs and Record Excerpts. If all copies of briefs and record excerpts do not conform to 5th Cir. R. 28 and 30 and all provisions of Fed. R. App. P. 32, the clerk will file the briefs and record excerpts, but is authorized to return all nonconforming copies. An extension of 10 days is allowed for resubmission in a conforming format. The court may strike briefs and record excerpts if the party fails to submit conforming briefs or record excerpts within 14 days. If at any time the clerk believes the non-conformance is egregious or in bad faith, the clerk, in the alternative to filing the nonconforming matters, may submit them to a single judge, who can reject them and direct that they be returned unfiled. Failure to submit conforming briefs or record excerpts may result in imposition of sanctions. (Amended Dec. 1, 2002; July 15, 2003; Dec. 1, 2005; Dec. 1, 2006; As amended Dec. 1, 2009.)

I.O.P.

Form of Record Excerpts/Appendix — See 5th Cir. R. 30.

FRAP 32.1. Citing Judicial Dispositions.

(a) *Citation Permitted.* A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

(1) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and

(2) issued on or after January 1, 2007.

(b) *Copies Required.* If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited. (Adopted effective December 1, 2006.)

FRAP 33. Appeal conferences.

The court may direct the attorneys — and, when appropriate, the parties — to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. A judge or other person designated by the court may preside over the conference, which may be conducted in person or by telephone. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement agreement.

I.O.P.

Appeal Conferences — See 5th Cir. R. 15.3.5.

FRAP 34. Oral argument.

(a) *In general.*

(1) *Party's statement.* Any party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted.

(2) *Standards.* Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:

(A) the appeal is frivolous;

(B) the dispositive issue or issues have been authoritatively decided; or

(C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

(b) *Notice of argument; postponement.* The clerk must advise all parties whether oral argument will be scheduled, and, if so, the date, time, and place for it, and the time allowed for each side. A motion to postpone the argument or to allow longer argument must be filed reasonably in advance of the hearing date.

(c) *Order and contents of argument.* The appellant opens and concludes the argument. Counsel must not read at length from briefs, records, or authorities.

(d) *Cross-appeals and separate appeals.* If there is a cross-appeal, Rule 28.1(b) determines which party is the appellant and which is the appellee for purposes of oral argument. Unless the court directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.

(e) *Nonappearance of a party.* If the appellee fails to appear for argument, the court must hear appellant's argument. If the appellant fails to appear for argument, the court may hear the appellee's argument. If neither party appears, the case will be decided on the briefs, unless the court orders otherwise.

(f) *Submission on briefs.* The parties may agree to submit a case for decision on the briefs, but the court may direct that the case be argued.

(g) *Use of physical exhibits at argument; removal.* Counsel intending to use physical exhibits other than documents at the argument must arrange to place them in the courtroom on the day of the argument before the court convenes. After the argument, counsel must remove the exhibits from the courtroom, unless the court directs otherwise. The clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them. (Amended effective December 1, 2005.)

Circuit Rule 34. Oral argument.

34.1 Docket Control. In the interest of docket control, the chief judge may from time to time appoint a panel or panels to review pending cases for appropriate assignment or disposition under this rule or any other rule of this court.

34.2 Oral Arguments. Oral argument is governed by Fed. R. App. P. 34. Cases not set for oral argument are placed on the summary calendar for decision. The

clerk will calendar the oral argument cases based upon the court's calendaring priorities. Counsel for each party must present oral argument unless excused by the court for good cause. The oral argument docket will show the time the court has allotted for each argument. If counsel for all parties indicate that oral argument is not necessary under paragraph .3 of this rule, the case will be governed by Fed. R. App. P. 34(f).

34.3 Submission Without Argument. A party desiring to waive oral argument in a case set for oral argument must file a motion to waive argument at least 7 days before the date set for hearing.

34.4 Number of Counsel To Be Heard. Not more than 2 counsel will be heard for each party on the argument of a case, and the time allowed may be apportioned between counsel in their discretion.

34.5 Expediting Appeals. The court may, on its own motion or for good cause on motion of either party, advance any case for hearing, and prescribe an abbreviated briefing schedule.

34.6 Continuance of Hearing. After a case has been set for hearing, the parties or counsel may not stipulate to delay the hearing. Only the court may delay argument for good cause shown. Engagement of counsel in other courts ordinarily is not considered good cause.

34.7 Recording of Oral Arguments. No cameras, tape recorders, or other equipment designed for the recording or transmission of visual images or sound may be present or used during oral argument. However, with the advance approval of the presiding judge, counsel may arrange, at their own expense, for a qualified court reporter to record and transcribe oral argument. If it is the court reporter's usual practice, the reporter may make and use a sound recording for the sole purpose of preparing an accurate transcript. The reporter may not make any recordings of the oral argument available to counsel, a party, or any other person until the court posts its recording of the oral argument on the court's Internet website. (Amended effective August 15, 2008.)

34.8 Criminal Justice Act Cases. The court expects court-appointed counsel to present oral argument. An associate attorney not appointed under the act may present argument only under the most pressing and unusual circumstances, and upon the court's advance authorization.

34.9 Checking In with Clerk's Office. On the day of hearing counsel must check in with the clerk 30 minutes before court convenes to confirm the name of the attorney or attorneys who will present argument for each party and how the argument time will be divided between opening and rebuttal. All counsel in the fourth and fifth cases on the docket heard in New Orleans may check in by telephone, but must report in person to the clerk's office within one hour after court convenes. On the last day of a New Orleans session, all attorneys must report in person to the clerk's office 30 minutes before court convenes.

34.10 Submission Without Argument. When a case is placed on the oral argument calendar, a judge of the court has determined that oral argument would be helpful. Therefore, requests of the parties to waive oral argument are not looked upon with favor, and counsel may be excused only by the court for good cause. See 5th Cir. R. 34.3.

If appellant fails to appear in a criminal appeal from conviction, the court will not hear argument from the United States.

34.11 Time for Oral Argument. The time allowed for oral argument is indicated on the printed calendar. Most cases are allowed 20 minutes to the side. The word "side" refers to parties in their position on appeal. Where in doubt, consult the clerk's office.

34.12 Additional Time for Oral Argument. Additional time for oral argument is sparingly permitted. Requests for additional time should be set forth in a motion or letter to the clerk filed well in advance of the oral argument.

34.13 Calling the Calendar. The court usually does not call the calendar unless there are special problems requiring attention. The court hears the cases in the order they appear on the calendar. (Amended December 1, 2009.)

I.O.P.

Screening — Screening is the name given to the method used by the court to determine whether cases should be argued orally or decided on briefs only. This is done under Fed. R. App. P. and 5th Cir. R. 34.

(A) The judges of the court screen cases with assistance from the Staff Attorney. When the last brief is filed, a case is generally sent to the Staff Attorney for prescreening classification. If the staff attorney concludes that the case does not warrant oral argument, a brief memorandum may be prepared and the case returned to the clerk. The clerk then routes the case to 1 of the court's judges, selected in rotation. If that judge agrees that the case does not warrant oral argument, the briefs, together with a proposed opinion, are forwarded to the 2 other judges on the screening panel. If any party requests oral argument, all panel judges must concur that the case does not warrant oral argument, and also in the panel opinion as a proper disposition without any special concurrence or dissent. If no party requests oral argument, all panel judges must concur that the case does not warrant oral argument. However, absent a party's request for oral argument, summary disposition may include a concurrence or a dissent by panel members.

(B) If the staff attorney concludes that oral argument is required, the case is sent to an active judge for screening. If the screening judge agrees, the case is placed on the next appropriate calendar, consistent with the court's calendaring priorities. If the screening judge disagrees with the recommendation for oral argument, that judge's screening panel disposes of the case under the summary calendar procedure.

Decision Without Oral Argument. — When all panel members agree that oral argument of a case is not needed, they advise the clerk the case has been placed on the summary calendar. The court's decision usually accompanies the notice to the clerk.

Court Year Schedule. — The clerk prepares a proposed court schedule for an entire year which is approved by the scheduling proctor and chief judge of the court. The court schedule does not consider what specific cases are to be heard, but only sets the weeks of court in relation to the probable volume of cases and judge power availability for the year.

Judge Assignments

Panel Selection Procedure. — Based on the number of weeks each active judge sits and the number of sittings available from the court's senior judges, and visiting circuit or district judges, the scheduling proctor and clerk create panels of judges for the sessions of the court for the entire court year. The judges are scheduled to avoid repetitive scheduling of panels composed of the same members.

Separation of Assignment of Judges and Calendaring of Cases. — The judge assignments are made available only to the judges for their advance planning of their workload for the forthcoming court year. To insure complete objectivity in the assignment of judges and the calendaring of cases, the two functions of (1) judge assignments to panels and (2) calendaring of cases are carefully separated.

Preparation and Publishing Calendars

General. — The clerk prepares calendars of cases under calendaring guidelines established by the court. Calendars are prepared for the number of sessions (usually between 3 and 5) scheduled for a month. Information about the names of the panel members is not disclosed within the clerk's office until the calendars of cases for the month are actually prepared so that briefs and other materials can be distributed.

Calendaring by Case Type. — The clerk balances the calendars by dividing the cases evenly among the panels by case type so that each panel for a particular month has more or less an equal number of different types of litigation for consideration.

Preference Cases. — The categories of cases listed in 5th Cir. R. 47.7 are given preference in processing and disposition. To assist the clerk in implementing this rule, any party to a civil appeal or review proceeding requiring priority status should notify the clerk and cite the statutory support for the preference.

Non-Preference Cases. — All other cases are calendared for hearing in accordance with the court's "first-in first-out" rule. Unless the court assigns special priority the oldest cases in point of time of availability of briefs are ordinarily calendared first for hearing.

Calendaring for Convenience of Counsel. — For the New Orleans sessions, cases with non-local lawyers are scheduled in the first positions on the calendar whenever possible for their convenience in making departure accommodations.

Number of Cases Assigned. — Unless special provision is made, a regular session of a panel of the court will hear 5 cases per day for 4 days, Monday through Thursday.

Advance Notice. — The court seeks to give counsel 60 days advance notice of cases set for oral argument.

Forwarding Briefs to Judges. — Immediately after formally issuing the calendar the clerk sends the panel members copies of the briefs for the cases set on the calendar.

Pre-Argument Preparation. — The judges invariably read all briefs prior to oral argument.

Identity of Panel. — The clerk may not disclose the names of the panel members for a particular session until 1 week in advance of the session.

Oral Argument

Presenting Argument. — Counsel should prepare their oral arguments knowing the judges have already studied the briefs. Reading from briefs, decisions, or the record is not permitted except in unusual circumstances. Counsel should be prepared to answer the court's questions. The court will consider a motion to extend the time allotted for argument if the court's questions prevent completion of counsel's argument.

Lighting Signal Procedure. — The courtroom deputy will keep track of the time using lighting signals:

(A) Appellant's Argument — A green light signals the beginning of the opening argument of appellant. Two minutes before expiration of the time allowed for opening argument, the green light goes off and a yellow light comes on. When the time reserved for opening argument expires, the yellow light goes off and a red light comes on. If counsel proceeds after the red light, time will be deducted from the rebuttal period.

(B) Appellee's Argument — The same procedure as outlined above is used.

(C) Appellant's Rebuttal — A green light signals commencement of time; a red light comes on when time expires. No yellow light is used.

Case Conferences and Designation of Writing Judge. — The panel hearing the arguments usually confers on the cases at the conclusion of each day's arguments. A tentative decision is reached and the presiding judge assigns responsibility for opinion writing. There is no pre-argument assignment of opinion writing. Judges do not specialize. Assignments are made to equalize the workload of the entire session.

FRAP 35. En banc determination.

(a) *When hearing or rehearing en banc may be ordered.* A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

(b) *Petition for hearing or rehearing en banc.* A party may petition for a hearing or rehearing en banc.

(1) The petition must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

(2) Except by the court's permission, a petition for an en banc hearing or rehearing must not exceed 15 pages, excluding material not counted under Rule 32.

(3) For purposes of the page limit in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.

(c) *Time for petition for hearing or rehearing en banc.* A petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due. A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.

(d) *Number of copies.* The number of copies to be filed must be prescribed by local rule and may be altered by order in a particular case.

(e) *Response.* No response may be filed to a petition for an en banc consideration unless the court orders a response.

(f) *Call for a vote.* A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote. (Amended effective December 1, 2005.)

Circuit Rule 35. Determination of causes by the court en banc.

35.1 Caution. Counsel are reminded that in every case the duty of counsel is fully discharged without filing a petition for rehearing en banc unless the case meets the rigid standards of Fed. R. App. P. 35(a). As is noted in Fed. R. App. P. 35, en banc hearing or rehearing is not favored. Among the reasons is that each request for en banc consideration must be studied by every active judge of the court and is a serious call on limited judicial resources. Counsel have a duty to the court commensurate with that owed their clients to read with attention and observe with restraint the standards of Fed. R. App. P. 35(b)(1). The court takes the view that, given the extraordinary nature of petitions for en banc consideration, it is fully justified in imposing sanctions on its own initiative under, *inter alia*, Fed. R. App. P. 38 and 28 U.S.C. § 1927, upon the person who signed the petitions, the represented party, or both, for manifest abuse of the procedure.

35.2 Form of Petition. Twenty copies of every petition for en banc consideration, whether upon initial hearing or rehearing, must be filed. The petition

must not be incorporated in the petition for rehearing before the panel, if one is filed, but must be complete in itself. In no case will a petition for en banc consideration adopt by reference any matter from the petition for panel rehearing or from any other briefs or motions in the case. A petition for en banc consideration must contain the following items, in order:

35.2.1 Certificate of interested persons required for briefs by 5th Cir. R. 28.2.1.

35.2.2 If the party petitioning for en banc consideration is represented by counsel, a statement as set forth in Fed. R. App. P. 35(b)(1).

35.2.3 Table of contents and authorities.

35.2.4 Statement of the issue or issues asserted to merit en banc consideration. It will rarely occur that these will be the same as those appropriate for panel rehearing. A petition for en banc consideration must be limited to the circumstances enumerated in Fed. R. App. P. 35(a).

35.2.5 Statement of the course of proceedings and disposition of the case.

35.2.6 Statement of any facts necessary to the argument of the issues.

35.2.7 Argument and authorities. These will concern only the issues required by paragraph (.2.4) hereof and shall address specifically, not only their merit, but why they are contended to be worthy of en banc consideration.

35.2.8 Conclusion.

35.2.9 Certificate of service.

35.2.10 A copy of the opinion or order sought to be reviewed. The opinion or order will be bound with the petition and shall not be marked or annotated.

35.3 Response to Petition. No response to a petition for en banc consideration will be received unless requested by the court.

35.4 Time and Form — Extensions. Any petition for rehearing en banc must be received in the clerk's office within the time specified in Fed. R. App. P. 40. Counsel should not request extensions of time except for the most compelling reasons.

35.5 Length. See Fed. R. App. P. 35(b)(2).

35.6 Determination of Causes En Banc and Composition of En Banc Court. A cause will be heard or reheard en banc when it meets the criteria for en banc set out in Fed. R. App. P. 35(a).

The en banc court will be composed of all active judges of the court plus any senior judge of the court who participated in the panel decision who elects to participate in the en banc consideration. This election is to be communicated timely to the chief judge and clerk. Any judge participating in an en banc poll, hearing, or rehearing while in regular active service who subsequently takes senior status may elect to continue participating in the final resolution of the case. (Amended July 15, 2003; Dec. 1, 2005; As amended Dec. 1, 2009.)

I.O.P.

Petition for Rehearing En Banc

Extraordinary Nature of Petitions for Rehearing En Banc. — A petition for rehearing en banc is an extraordinary procedure that is intended to bring to

the attention of the entire court an error of exceptional public importance or an opinion that directly conflicts with prior Supreme Court, Fifth Circuit or state law precedent, subject to the following: Alleged errors in the facts of the case (including sufficiency of the evidence) or in the application of correct precedent to the facts of the case are generally matters for panel rehearing but not for rehearing en banc.

The Most Abused Prerogative. — Petitions for rehearing en banc are the most abused prerogative of appellate advocates in the Fifth Circuit. Fewer than 1% of the cases decided by the court on the merits are reheard en banc; and frequently those rehearings granted result from a request for en banc reconsideration by a judge of the court rather than a petition by the parties.

Handling of Petition by the Judges

Panel Has Control. — Although each panel judge and every active judge receives a copy of the petition for rehearing en banc, the filing of a petition for rehearing en banc does not take the case out of the control of the panel deciding the case. A petition for rehearing en banc is treated as a petition for rehearing by the panel if no petition is filed. The panel may grant rehearing without action by the full court.

Requesting a Poll. — Within 10 calendar days of the filing of the petition, any active judge of the court or any member of the panel rendering the decision, who desires that the case be reheard en banc, may notify the writing judge (the senior active Fifth Circuit judge if the writing judge is a non-active member) to this effect on or before the date shown on the clerk's form that transmits the suggestion. This notification is also notice that if the panel declines to grant rehearing, an en banc poll is desired.

If the panel decides not to grant the rehearing after such notice, it notifies the chief judge, who then polls the court by written ballot on whether en banc rehearing should be granted.

Requesting a Poll on Court's Own Motion. — Any active member of the court or any member of the panel rendering the decision may request a poll of the active members of the court whether rehearing en banc should be granted, whether or not a party filed a petition for rehearing en banc. A requesting judge ordinarily sends a letter to the chief judge with copies to the other active judges of the court and any other panel member.

Polling the Court. — When a request to poll the court is made, each active judge of the court casts a ballot and sends a copy to all other active judges of the court and any senior Fifth Circuit judge who is a panel member. The ballot indicates whether the judge voting desires oral argument if en banc is granted.

Negative Poll. — If the vote is unfavorable to the grant of en banc consideration, the chief judge advises the writing judge. The panel originally hearing the case then enters an appropriate order.

Affirmative Poll. — If a majority of the judges in active service who are not disqualified, vote for en banc hearing or rehearing, the chief judge instructs the clerk as to an appropriate order. The order indicates a rehearing en banc with

or without oral argument has been granted, and specifies a briefing schedule for filing of en banc briefs. The appellant's en banc brief will have a blue cover; The appellee's en banc brief will have a red cover.

Every party must then furnish to the clerk 20 additional copies of every brief the party previously filed.

No Poll Request. — If the specified time for requesting a poll has expired and the writing judge of the panel has not received a request from any active member of the court, or other panel member, the judge may take such action deemed appropriate on the petition. However, in the order disposing of the case and the petition, the panel's order denying the petition for rehearing en banc must show no poll was requested.

Capital Cases. — Consistent with long established legal principle and uniformly followed practice, the filing of a petition for rehearing (or hearing) en banc does not constitute or operate as a stay of execution and does not preclude carrying out an execution.

Timely petitions for rehearing (or hearing) en banc which are filed in a capital case while a scheduled execution date is pending and less than 22 calendar days before the scheduled date will be processed and distributed in the manner prescribed by the chief judge or delegee. The Chief Judge or delegee may order expedited consideration thereof and set a time limit for each judge eligible to vote thereon to advise the chief judge or delegee whether to call for a poll and whether (if a poll is or were to be timely requested by any judge) the judge would vote for or against rehearing (or hearing) en banc, and the petition for rehearing (or hearing) en banc will be disposed of accordingly. If no poll is timely requested, or if a poll results in no rehearing (or hearing) en banc, the panel may enter an order denying rehearing (or hearing) en banc. If a poll results in a grant of rehearing (or hearing) en banc, the chief judge, or delegee, will enter an order staying the execution pending further order of the court.

FRAP 36. Entry of judgment; notice.

(a) *Entry.* A judgment is entered when it is noted on the docket. The clerk must prepare, sign, and enter the judgment:

(1) after receiving the court's opinion — but if settlement of the judgment's form is required, after final settlement; or

(2) if a judgment is rendered without an opinion, as the court instructs.

(b) *Notice.* On the date when judgment is entered, the clerk must serve on all parties a copy of the opinion — or the judgment, if no opinion was written — and a notice of the date when the judgment was entered. (Amended December 1, 2002.)

FRAP 37. Interest on judgment.

(a) *When the court affirms.* Unless the law provides otherwise, if a money judgment in a civil case is affirmed, whatever interest is allowed by law is payable from the date when the district court's judgment was entered.

(b) *When the court reverses.* If the court modifies or reverses a judgment with a direction that a money judgment be entered in the district court, the mandate must contain instructions about the allowance of interest.

FRAP 38. Frivolous appeal — Damages and costs.

If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

FRAP 39. Costs.

(a) *Against whom assessed.* The following rules apply unless the law provides or the court orders otherwise:

(1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;

(2) if a judgment is affirmed, costs are taxed against the appellant;

(3) if a judgment is reversed, costs are taxed against the appellee;

(4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

(b) *Costs for and against the United States.* Costs for or against the United States, its agency, or officer will be assessed under Rule 39(a) only if authorized by law.

(c) *Costs of copies.* Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

(d) *Bill of costs: objections; insertion in mandate.*

(1) A party who wants costs taxed must — within 14 days after entry of judgment — file with the circuit clerk, with proof of service, an itemized and verified bill of costs.

(2) Objections must be filed within 14 days after service of the bill of costs, unless the court extends the time.

(3) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must — upon the circuit clerk's request — add the statement of costs, or any amendment of it, to the mandate.

(e) *Costs on appeal taxable in the district court.* The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

(1) the preparation and transmission of the record;

(2) the reporter's transcript, if needed to determine the appeal;

(3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.

Circuit Rule 39. Costs.

39.1 Taxable Rates. The cost of reproducing necessary copies of the briefs, appendices, or record excerpts shall be taxed at a rate of actual cost, or $ .15 per page, whichever is less, including cover, index, and internal pages, for any form of reproduction costs. The cost of the binding required by 5th Cir. R. 32.2.3 that mandates that briefs must lie reasonably flat when open shall be a taxable cost but not limited to the foregoing rate. This rate is intended to approximate the current cost of the most economical acceptable method of reproduction generally available; and the clerk will, at reasonable intervals, examine and review it to reflect current rates. Taxable costs will be authorized for up to 15 copies for a brief and 10 copies of an appendix or record excerpts, unless the clerk gives advance approval for additional copies.

39.2 Nonrecovery of Mailing and Commercial Delivery Service Costs. Mailing and commercial delivery fees incurred in transmitting briefs are not recoverable as taxable costs.

39.3 Time for Filing Bills of Costs. The clerk must receive bills of costs and any objections within the times set forth in Fed. R. App. P. 39(d). See 5th Cir. R. 26.1. (Amended July 15, 2003, Dec. 1, 2007; As amended Dec. 1, 2009.)

FRAP 40. Petition for panel rehearing.

(a) *Time to file; contents; answer; action by the court if granted.*

(1) *Time.* Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, unless an order shortens or extends the time, the petition may be filed by any party within 45 days after entry of judgment if one of the parties is:

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D)) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf — including all instances in which the United States represents that person when the court of appeals' judgment is entered or files the petition for that person.

(2) *Contents.* The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.

(3) *Answer.* Unless the court requests, no answer to a petition for panel rehearing is permitted. But ordinarily rehearing will not be granted in the absence of such a request.

(4) *Action by the court.* If a petition for panel rehearing is granted, the court may do any of the following:

(A) make a final disposition of the case without reargument;

(B) restore the case to the calendar for reargument or resubmission; or

(C) issue any other appropriate order.

(b) *Form of petition; length.* The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Unless the court permits or a local rule provides otherwise, a petition for panel rehearing must not exceed 15 pages.

Circuit Rule 40. Petition for rehearing.

40.1 Copies. Four copies of all petitions for rehearing will be filed. A party seeking panel rehearing must attach to the petition an unmarked copy of the opinion or order sought to be reviewed. If the party contemporaneously files a petition for rehearing en banc and attaches a copy of the opinion or order required by 5th Cir. R. 35.2.10, the party does not have to attach a copy to the petition for panel rehearing.

40.2 Limited Nature of Petition for Panel Rehearing. A petition for rehearing is intended to bring to the attention of the panel claimed errors of fact or law in the opinion. It is not used for reargument of the issue previously presented or to attack the court's well-settled summary calendar procedures. Petitions for rehearing of panel decisions are reviewed by panel members only.

40.3 Length. See Fed. R. App. P. 40(b).

40.4 Time for Filing. The clerk must receive a petition for rehearing within the time prescribed in Fed. R. App. P. 40(a). (Amended July 15, 2003; As amended Dec. 1, 2009.)

I.O.P.

Necessity for Filing. — It is not necessary to file a petition for rehearing in the court of appeals as a prerequisite to filing a petition for certiorari in the Supreme Court of the United States.

Capital Cases. — Consistent with long established legal principle and uniformly followed practice, the filing of a petition for rehearing does not constitute or operate as a stay of execution and does not preclude carrying out an execution.

FRAP 41. Mandate: contents; issuance and effective date; stay.

(a) *Contents.* Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) *When issued.* The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

(c) *Effective date.* The mandate is effective when issued.

(d) *Staying the mandate.*

(1) *On petition for rehearing or motion.* The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate,

stays the mandate until disposition of the petition or motion, unless the court orders otherwise.

(2) *Pending petition for certiorari.*

(A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.

(B) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

(C) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

(D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

Circuit Rule 41. Issuance of mandate; stay of mandate.

41.1 Stay of Mandate — Criminal Appeals. A motion for a stay of the issuance of a mandate in a direct criminal appeal filed under Fed. R. App. P. 41 will not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly demonstrates that a substantial question is to be presented to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith.

41.2 Recall of Mandate. Once issued a mandate shall not be recalled except to prevent injustice.

41.3 Effect of Granting Rehearing En Banc. Unless otherwise expressly provided, the granting of a rehearing en banc vacates the panel opinion and judgment of the court and stays the mandate. If, after voting a case en banc, the court lacks a quorum to act on the case for 30 consecutive days, the case is automatically returned to the panel, the panel opinion is reinstated as an unpublished (and hence nonprecedential) opinion, and the mandate is released. To act on a case, the en banc court must have a quorum consisting of a majority of the en banc court as defined in 28 U.S.C. § 46(c).

41.4 Issuance of Mandate in Expedited Appeals or Mandamus Actions. The clerk will issue the mandate forthwith in any expedited appeal of a criminal sentence and in actions denying mandamus relief, unless instructed otherwise by the court. (Amended July 15, 2003; As amended Dec. 1, 2009; as amended October 31, 2011.)

I.O.P.

Absent a motion for stay or a stay by operation of an order, rule, or procedure, mandates will issue promptly on the 8th calendar day after the time for filing a petition for rehearing expires; or after entry of an order denying the petition. As an exception, and by court direction, the clerk shall immediately issue the mandate when the court dismisses a case for failure to prosecute an

appeal or for lack of jurisdiction, or in such other instances as the court may direct. The original record and any exhibits will be returned to the clerk of the district court with the mandate.

FRAP 42. Voluntary dismissal.

(a) *Dismissal in the district court.* Before an appeal has been docketed by the circuit clerk, the district court may dismiss the appeal on the filing of a stipulation signed by all parties or on the appellant's motion with notice to all parties.

(b) *Dismissal in the court of appeals.* The circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. But no mandate or other process may issue without a court order. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

Circuit Rule 42. Voluntary dismissal.

42.1 Dismissal by Appellant. In all cases where the appellant or petitioner files an unopposed motion to withdraw the appeal or agency review proceeding, the clerk will enter an order of dismissal and issue a copy of the order as the mandate.

42.2 Frivolous and Unmeritorious Appeals. If upon the hearing of any interlocutory motion or as a result of a review under 5th Cir. R. 34, it appears to the court that the appeal is frivolous and entirely without merit, the appeal will be dismissed.

42.3 Dismissal for Failure To Prosecute.

42.3.1 In direct criminal appeals proceeding in forma pauperis, the provisions of 5th Cir. R. 42.3.1.1 and 42.3.1.2 apply. In habeas cases, actions filed under 28 U.S.C.S. § 2255, and other prisoner matters proceeding in forma pauperis, the provisions of 5th Cir. R. 42.3.1.1 apply if the appellant is represented by counsel; prisoners proceeding pro se will be given an initial written deadline for filing a certificate of appealability, filing any briefs, for paying fees, or for complying with other directives of the court. If pro se prisoners do not meet the deadline established, or timely request an extension of time, the clerk will dismiss the appeal without further notice, 15 days after the deadline date.

42.3.1.1 Appeals with Counsel. If appellant is represented by appointed or retained counsel, the clerk will issue a notice to counsel that, upon expiration of 15 days from the date of the notice, the appeal may be dismissed for want of prosecution unless prior to that date the default is remedied, and must enter an order directing counsel to show cause within 15 days from the date of the order why disciplinary action should not be taken against counsel. If the default is remedied within that time, the clerk must not dismiss the appeal and may refer to the court the matter of disciplinary action against the attorney. If the default is not remedied within that time, the clerk may enter an order dismissing the appeal for want of prosecution or may refer to the court the

question of dismissal. The clerk must refer to the court the matter of disciplinary action against the attorney. The court may refer the matter of disciplinary action to a special master including but not limited to a district or magistrate judge.

42.3.1.2 Appeals without Counsel. The clerk must issue a notice to appellant that 15 days from the date of the notice the appeal will be dismissed for want of prosecution, unless the default is remedied before that date. If the default is remedied within that time, the clerk must not dismiss the appeal.

42.3.2 In all other appeals when appellant fails to order the transcript, fails to file a brief, or otherwise fails to comply with the rules of the court, the clerk must dismiss the appeal for want of prosecution.

42.3.3 In all instances of failure to prosecute an appeal to hearing as required, the court may take such other action as it deems appropriate.

42.3.4 An order dismissing an appeal for want of prosecution must be issued to the clerk of the district court as the mandate.

42.4 Dismissals Without Prejudice. In acting on a motion under 5th Cir. R. 27.1.3 to stay further proceedings, the clerk may enter such appeals or agency review proceedings as dismissed without prejudice to the right of reinstatement of the appeal within 180 days from the date of dismissal. Any party desiring reinstatement, or an extension of the time to seek reinstatement, must notify the clerk in writing within the time period allowed for reinstatement. This procedure does not apply where the stay is sought pending a decision of this court in another case, a decision of the Supreme Court, or a stay on the court's own motion. If the appeal is not reinstated within the period fixed, the appeal is deemed dismissed with prejudice. However, an additional period of 180 days from the date of dismissal will be allowed for applying for relief from a dismissal with prejudice which resulted from mistake, inadvertence, or excusable neglect of counsel or a pro se litigant. (Amended July 15, 2003; As amended Dec. 1, 2009.)

FRAP 43. Substitution of parties.

(a) *Death of a party.*

(1) *After notice of appeal is filed.* If a party dies after a notice of appeal has been filed or while a proceeding is pending in the court of appeals, the decedent's personal representative may be substituted as a party on motion filed with the circuit clerk by the representative or by any party. A party's motion must be served on the representative in accordance with Rule 25. If the decedent has no representative, any party may suggest the death on the record, and the court of appeals may then direct appropriate proceedings.

(2) *Before notice of appeal is filed — Potential appellant.* If a party entitled to appeal dies before filing a notice of appeal, the decedent's personal representative — or, if there is no personal representative, the decedent's attorney of record — may file a notice of appeal within the time prescribed by these rules. After the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1).

(3) *Before notice of appeal is filed — Potential appellee.* If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court, but before a notice of appeal is filed, an appellant may proceed as if the death had not occurred. After the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1).

(b) *Substitution for a reason other than death.* If a party needs to be substituted for any reason other than death, the procedure prescribed in Rule 43(a) applies.

(c) *Public officer: identification; substitution.*

(1) *Identification of party.* A public officer who is a party to an appeal or other proceeding in an official capacity may be described as a party by the public officer's official title rather than by name. But the court may require the public officer's name to be added.

(2) *Automatic substitution of officeholder.* When a public officer who is a party to an appeal or other proceeding in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate. The public officer's successor is automatically substituted as a party. Proceedings following the substitution are to be in the name of the substituted party, but any misnomer that does not affect the substantial rights of the parties may be disregarded. An order of substitution may be entered at any time, but failure to enter an order does not affect the substitution.

FRAP 44. Case involving a constitutional question when the United States or the relevant state is not a party.

(a) *Constitutional challenge to federal statute.* If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.

(b) *Constitutional challenge to state statute.* If a party questions the constitutionality of a statute of a State in a proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State.

FRAP 45. Clerk's duties.

(a) *General provisions.*

(1) *Qualifications.* The circuit clerk must take the oath and post any bond required by law. Neither the clerk nor any deputy clerk may practice as an attorney or counselor in any court while in office.

(2) *When court is open.* The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance must be open during

business hours on all days except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

(b) *Records.*

(1) *The docket.* The circuit clerk must maintain a docket and an index of all docketed cases in the manner prescribed by the Director of the Administrative Office of the United States Courts. The clerk must record all papers filed with the clerk and all process, orders, and judgments.

(2) *Calendar.* Under the court's direction, the clerk must prepare a calendar of cases awaiting argument. In placing cases on the calendar for argument, the clerk must give preference to appeals in criminal cases and to other proceedings and appeals entitled to preference by law.

(3) *Other records.* The clerk must keep other books and records required by the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, or by the court.

(c) *Notice of an order or judgment.* Upon the entry of an order or judgment, the circuit clerk must immediately serve a notice of entry on each party, with a copy of any opinion, and must note the date of service on the docket. Service on a party represented by counsel must be made on counsel.

(d) *Custody of records and papers.* The circuit clerk has custody of the court's records and papers. Unless the court orders or instructs otherwise, the clerk must not permit an original record or paper to be taken from the clerk's office. Upon disposition of the case, original papers constituting the record on appeal or review must be returned to the court or agency from which they were received. The clerk must preserve a copy of any brief, appendix, or other paper that has been filed. (Amended December 1, 2002; amended December 2, 2005.)

Circuit Rule 45. Duties of clerks.

45.1 Location. The clerk's office is maintained in the city of New Orleans, Louisiana.

45.2 Release of Original Papers. The clerk may release original records or papers without a court order for a limited time upon a party's or counsel's request, to facilitate preparation of a brief in a pending appeal.

45.3 Office To Be Open. The clerk's office is open for business on all days except Saturdays, Sundays, designated federal holidays, and Mardi Gras.

I.O.P.

Office hours are from 8:00 a.m. to 5:00 p.m. central time Monday through Friday.

(A) The clerk's office welcomes telephone inquiries from counsel concerning rules and procedures. Telephone No. (504) 310-7700.

(B) In emergency situations after normal office hours, or on weekends, call the number shown above. An automated attendant provides an option connecting the caller to the emergency duty deputy.

FRAP 46. Attorneys.

(a) *Admission to the bar.*

(1) *Eligibility.* An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).

(2) *Application.* An applicant must file an application for admission, on a form approved by the court that contains the applicant's personal statement showing eligibility for membership. The applicant must subscribe to the following oath or affirmation:

"I, _____, do solemnly swear [or affirm] that I will conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States."

(3) *Admission procedures.* On written or oral motion of a member of the court's bar, the court will act on the application. An applicant may be admitted by oral motion in open court. But, unless the court orders otherwise, an applicant need not appear before the court to be admitted. Upon admission, an applicant must pay the clerk the fee prescribed by local rule or court order.

(b) *Suspension or disbarment.*

(1) *Standard.* A member of the court's bar is subject to suspension or disbarment by the court if the member:

(A) has been suspended or disbarred from practice in any other court; or

(B) is guilty of conduct unbecoming a member of the court's bar.

(2) *Procedure.* The member must be given an opportunity to show good cause, within the time prescribed by the court, why the member should not be suspended or disbarred.

(3) *Order.* The court must enter an appropriate order after the member responds and a hearing is held, if requested, or after the time prescribed for a response expires, if no response is made.

(c) *Discipline.* A court of appeals may discipline an attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with any court rule. First, however, the court must afford the attorney reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing.

Circuit Rule 46. Attorneys.

46.1 Admission and Fees. Attorneys must have and maintain a valid underlying license to practice law issued by a governmental licensing authority listed in Fed. R. App. P.46(a)(1) to be admitted and continue to practice

before this court. Admission is governed by Fed. R. App. P. 46 and this rule. Attorneys admitted to this court must provide the clerk a valid e-mail and mailing address, as well as a working telephone number, and must provide updated information to the clerk when changes occur. Attorneys are admitted for a period of five years and must, after notice from the clerk, timely apply for readmission. To be admitted or readmitted, an attorney must pay the fee fixed by court order. No fee will be required of an attorney who otherwise has all qualifications for admission and is: appointed to represent an appellant in forma pauperis; appearing on behalf of the United States; or newly graduated from law school, licensed to practice in Louisiana, Mississippi, or Texas, and on orders for extended active duty in the Judge Advocate General's Corps.

46.2 Suspension or Disbarment. In addition to Fed. R. App. P. 46(b), attorneys may be suspended or removed from the roll of attorneys permitted to practice before this court if the appropriate law licensing authority withdraws or suspends the attorney's license to practice law, or the license to practice lapses.

46.3 Entry of Appearance. Attorneys admitted to the bar of this court must enter their appearance in each case in which they participate at the time the case is docketed or upon notice by the clerk. A form for entry of appearance is provided by the clerk. In addition to other pertinent information, the form requires counsel to cite all pending related cases and any cases on the docket of the Supreme Court, or this or any other United States Court of Appeals, which involve a similar issue or issues. Counsel must update such information at the time of briefing. Counsel must also indicate on the form whether the appeal is in a category of cases requiring preference in processing and disposition as set out in 5th Cir. R. 47.7. (Amended Dec. 1, 2002; July 15, 2003; Aug. 15, 2008; As amended Dec. 1, 2009.)

I.O.P.

Disciplinary Action. — Fed. R. App. P. 46(b) and (c) govern the procedures followed to invoke disciplinary action against any member of the bar of this court for failure to comply with the rules of this court, or for conduct unbecoming a member of the bar.

Duties of Court Appointed Counsel. — The Judicial Council of the Fifth Circuit has adopted a plan under the Criminal Justice Act detailing the duties and responsibilities of court appointed counsel. A copy of this plan is available from the clerk.

An appointed counsel may claim compensation for services furnished by a partner or associate within the maximum compensation allowed by the act. However, the court expects court-appointed counsel to take the lead in preparing the brief and presenting oral argument, if argument is allowed. Claims by associate counsel for in-court services and travel expenses incurred in connection therewith are not allowed unless the partner or associate is appointed under the Criminal Justice Act on advance motion and approval by the court.

FRAP 47. Local rules by courts of appeals.

(a) *Local rules.*

(1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with — but not duplicative of — Acts of Congress and rules adopted under 28 U.S.C.S. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended.

(2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

(b) *Procedure when there is no controlling law.* A court of appeals may regulate practice in a particular case in any manner consistent with federal law, these rules, and local rules of the circuit. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

Circuit Rule 47. Other Fifth Circuit Rules.

47.1 Name, Seal and Process.

(a) *Name.* The name of this court is "United States Court of Appeals for the Fifth Circuit."

(b) *Seal.* The seal of this court contains the American eagle encircled with the words "United States Court of Appeals" on the upper part of the outer edge; and the words "Fifth Circuit" on the lower part of the outer edge, running from left to right.

(c) *Writs and Process.* Writs and process of this court are under the seal of the court and signed by the clerk.

47.2 Sessions. Court sessions are held in each of the states constituting the circuit at least once each year. Sessions may be scheduled at any location having adequate facilities. On motion of a party or on the court's own motion, the court may change the hearing of any appeal to another location or time.

47.3 Circuit Executive, Library, and Staff Attorneys.

(a) *Circuit Executive.* The circuit executive's office is maintained at New Orleans, Louisiana. The circuit executive acts as Secretary of the Judicial Council of the Fifth Circuit, provides administrative support to the court, and performs such other duties as the judicial council or the chief judge assigns.

(b) *Library.* A public library is maintained at New Orleans, Louisiana, which is open during hours fixed by the court. Books and materials may not be removed from the library without permission of the librarian. Other libraries may be maintained at such places in the circuit as the court designates.

(c) *Staff Attorneys.* A central staff of attorneys is maintained at New Orleans, Louisiana, to perform such research and record analysis as the court directs.

47.4 Bankruptcy Appeals.

47.4.1 The Fed. R. App. P. and 5th Cir. R. apply to all appeals from United States Bankruptcy Courts to this court.

47.4.2 Appeals docketed in the district court or with the clerk of any authorized appellate panels, may not be transferred to this court unless the district judge or appellate panel approves the transfer in writing.

47.5 Publication of Opinions.

47.5.1 Criteria for Publication. The publication of opinions that merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession. However, opinions that may in any way interest persons other than the parties to a case should be published. Therefore, an opinion is published if it:

(a) Establishes a new rule of law, alters, or modifies an existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked;

(b) Applies an established rule of law to facts significantly different from those in previous published opinions applying the rule;

(c) Explains, criticizes, or reviews the history of existing decisional or enacted law;

(d) Creates or resolves a conflict of authority either within the circuit or between this circuit and another;

(e) Concerns or discusses a factual or legal issue of significant public interest; or

(f) Is rendered in a case that has been reviewed previously and its merits addressed by an opinion of the United States Supreme Court.

An opinion may also be published if it:

Is accompanied by a concurring or dissenting opinion; or reverses the decision below or affirms it upon different grounds.

47.5.2 Publication Decision. An opinion will be published unless each member of the panel deciding the case determines that its publication is neither required nor justified under the criteria for publication. If any judge of the court or any party so requests the panel will reconsider its decision not to publish an opinion. The opinion will be published if, upon reconsideration, each member of the panel determines that it meets one or more of the criteria for publication or should be published for any other good reason, and the panel issues an order to publish the opinion.

47.5.3 Unpublished Opinions Issued Before January 1, 1996. Unpublished opinions issued before January 1, 1996, [Effective date of amended Rule] are precedent. Although every opinion believed to have precedential value is published, an unpublished opinion may be cited pursuant to Fed. R. App. P. 32.1(a). The party citing to an unpublished judicial disposition must provide a citation to the disposition in a publicly accessible electronic database. If the disposition is not available in an electronic database, a copy of any unpub-

lished opinion cited in any document being submitted to the court, must be attached to each copy of the document, as required by Fed. R. App. P. 32.1(b).

47.5.4 Unpublished Opinions Issued on or After January 1, 1996. Unpublished opinions issued on or after January 1, 1996, [Effective date of amended Rule] are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like). An unpublished opinion may, however, be persuasive. An unpublished opinion may be cited, pursuant to Fed. R. App. P. 32.1(a). The party citing to an unpublished judicial disposition should provide a citation to the disposition in a publicly accessible electronic database. If the disposition is not available in an electronic database, a copy of any unpublished opinion cited in any document being submitted to the court must be attached to each copy of the document, as required by Fed. R. App. P. 32.1(b). The first page of each unpublished opinion bears the following legend:

Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

47.5.5 Definition of "Published." An opinion is considered as "published" for purposes of this rule when the panel deciding the case determines, in accordance with 5th Cir. R. 47.5.2, that the opinion will be published and the opinion is issued.

47.6 Affirmance Without Opinion. The judgment or order may be affirmed or enforced without opinion when the court determines that an opinion would have no precedential value and that any one or more of the following circumstances exists and is dispositive of a matter submitted for decision: (1) that a judgment of the district court is based on findings of fact that are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) in the case of a summary judgment, that no genuine issue of material fact has been properly raised by the appellant; and (5) no reversible error of law appears. In such case, the court may, in its discretion, enter either of the following orders: "AFFIRMED. See 5th Cir. R. 47.6." or "ENFORCED. See 5th Cir. R. 47.6."

47.7 Calendaring Priorities. The following categories of cases are given preference in processing and disposition: (1) appeals in criminal cases, (2) habeas corpus petitions and motions attacking a federal sentence, (3) proceedings involving recalcitrant witnesses before federal courts or grand juries under 28 U.S.C.S. § 1826, (4) actions for temporary or preliminary injunctive relief, and (5) any other action if good cause therefor is shown. (Fed. R. App. P. 45(b) and 28 U.S.C.S. § 1657).

47.8 Attorney's Fees.

47.8.1 Supporting Requirements. Petitions or motions for the award of attorney's fees should always be supported by contemporaneous time records recording all work for which a fee is claimed and reflecting the hours or fractional hours of work done and the specific professional level of services

performed by each lawyer seeking compensation. In the absence of such records, time expended will not be considered in setting the fee beyond the minimum amount necessary in the court's judgment for any lawyer to produce the work seen in court. Exceptions may be made only to avoid an unconscionable result.

The clerk will make reasonable efforts to advise counsel about this rule, but whether or not counsel has been advised, ignorance of this rule is not, standing alone, grounds for an exception. If the reasonableness of the hours claimed on the basis of time records becomes an issue, the applicant must make time records available for inspection by opposing counsel and, if a dispute is not resolved between them, by the court.

47.8.2 Attorney's Fees and Expenses Under the Equal Access to Justice Act. This rule implements the provisions of the Equal Access to Justice Act, Public Law No. 96-481, 94 Stat. 2325 (1980).

(a) Applications to the Court of Appeals. An application for an award of fees and expenses pursuant to 28 U.S.C.S. § 2412(d)(1)(B) must identify the applicant and the proceeding for which an award is sought. The application must show the nature and extent of services provided in this court and that the applicant has prevailed, and must identify the position of the United States or an agency thereof that the applicant alleges was not substantially justified.

(b) Petitions by Permission. A petition for leave to appeal pursuant to 5 U.S.C.S. § 504(c)(2) must be filed with the clerk of the court of appeals within 30 days after the entry of the agency's order, with proof of service on all other parties to the agency's proceedings.

(c) The petition must contain a copy of the order to be reviewed and any findings of fact, conclusions of law, and opinion relating thereto, a statement of the facts necessary to an understanding of the petition, and a memorandum showing why the petition for permission to appeal should be granted. An answer may be filed within 30 days after service of the petition, unless otherwise directed by the court. The application and any answer will be submitted without further briefing and oral argument unless otherwise ordered.

(d) An original and 3 copies must be filed with the court.

(e) Within 10 days after the entry of an order granting permission to appeal, the applicant must pay the clerk of this court the docket fee prescribed by the Judicial Conference of the United States. Upon receipt of the payment, the clerk will enter the appeal upon the docket. The record shall be transmitted and filed in accordance with Fed. R. App. P. 17. A notice of appeal need not be filed.

(f) Appeals/Petitions to Review. Appeals and petitions to review matters otherwise contemplated by the Equal Access to Justice Act may be filed pursuant to the applicable statutes and rules of the court.

47.9 Rules for Judicial — Conduct and Judicial Disability Proceedings .

See separately published Judicial Council of the Fifth Circuit Rules for Judicial-Conduct or Judicial-Disability effective May 4, 2008.

47.10 Rule Governing Appeals Raising Sentencing Guidelines Issues — 18 U.S.C.S. § 3742.

47.10.1 Scope of Rules. These rules govern procedures in appeals raising sentencing issues pursuant to 18 U.S.C.S. § 3742(a) or (b). These cases will proceed in the same manner and under the general rules of court governing other appeals and will not be given special expedited treatment over other criminal cases, except as hereinafter specified.

47.10.2 Motion to Expedite. If the defendant is incarcerated for a period of 1 year or less pursuant to the sentence appealed, a party may file a motion to expedite the appeal upon a showing of irreparable harm. The motion must set out: (a) when the trial transcript can be prepared and made available; and, (b) how soon thereafter appellant can file a brief. The court disfavors bifurcation of issues concerning sentencing from those issues involving the conviction.

47.10.3 The Appellate Record.

(a) *Oral Reasons for Imposition of Sentence.* The oral statement of reasons of the district court for imposition of a sentence as required by 18 U.S.C.S. § 3553(c), as amended, must be reduced to writing, filed, and incorporated in the record on appeal.

(b) *Transcript of Sentencing Proceedings.* In addition to the requirements of Fed. R. App. P. 10(b) and 5th Cir. R. 10.1 for ordering the transcript of trial proceedings, appellant is required to order a transcript of the entire sentencing proceeding (excluding the oral statement of reasons for sentencing of the district court) if a sentencing issue under 18 U.S.C.S. § 3742 will be raised on appeal.

(c) *Presentence Report.* If a notice of appeal is filed as authorized by 18 U.S.C. § 3742(a) and (b) for review of a sentence, the clerk will transmit to this court the presentence report. The report is transmitted separately from other parts of the record on appeal and is labeled as a sealed record if sealed by the district court.

(d) Presentence reports filed in this court as part of a record on appeal are treated as matters of public record except where the report, or a portion thereof was sealed by order of the district court.

(e) Counsel wishing access to, or a copy of, sealed presentence reports, or portions of such reports, may request them from the clerk's office by such means as the clerk permits. Counsel must return the copy of the presentence report, without duplicating it. Counsel should avoid disclosure of confidential matters in their public filings. (Amended Dec. 1, 2002; July 15, 2003, Nov. 1, 2004; Dec. 1, 2006; As amended Dec. 1, 2009.)

FRAP 48. Masters.

(a) *Appointment; powers.* A court of appeals may appoint a special master to hold hearings, if necessary, and to recommend factual findings and disposition in matters ancillary to proceedings in the court. Unless the order referring a matter to a master specifies or limits the master's powers, those powers include, but are not limited to, the following:

(1) regulating all aspects of a hearing;

(2) taking all appropriate action for the efficient performance of the master's duties under the order;

(3) requiring the production of evidence on all matters embraced in the reference; and

(4) administering oaths and examining witnesses and parties.

(b) *Compensation.* If the master is not a judge or court employee, the court must determine the master's compensation and whether the cost is to be charged to any party.

I.O.P.

OTHER INTERNAL OPERATING PROCEDURES

Judicial Council. — The judicial council established by 28 U.S.C. § 332 is composed of 19 judges — the chief circuit judge, nine circuit judges, and nine district judges. The chief circuit judge and the active circuit judge next in seniority serve permanent terms. All other council members serve for staggered three-year terms. The council meets on call of the chief circuit judge pursuant to statute.

Judicial Conference. — Pursuant to 28 U.S.C. § 333, the chief circuit judge may summon biennially or annually the federal judges of the circuit to a conference, at a designated time and place, for the purpose of considering the state of business of the courts and advising means of improving the administration of justice within the circuit. A copy of the court's rule for representation and active participation of the members of the bar of the circuit is available from the clerk or circuit executive.

Lawyers Advisory Committee. — The court is assisted in its rule-making function and in the drafting of these Internal Operating Procedures by a committee composed of 2 lawyers from each state in the circuit. These lawyers are appointed for staggered terms by the chief judge upon recommendation of the circuit judges from that state. Their terms are for 2 years. They examine and comment upon suggested rule and procedure changes.

Recusal or Disqualification of Judges.

(A) Grounds — Judges may recuse themselves under any circumstances considered sufficient to require such action. Judges must disqualify themselves under circumstances set forth in 28 U.S.C. § 455, or in accordance with Canon 3C, Code of Conduct for United States Judges as adopted by the Judicial Conference of the United States.

(B) Procedure

(1) Administrative Motions — If an initiating judge recuses himself or herself from considering, or is disqualified to consider an administrative motion, he or she will notify the clerk, who will advise the recused judge of the next initiating judge and request that the file be sent to that judge.

(2) Summary Calendar Cases — The above procedure is followed, except that the substitute or backup judge is called because it is court practice that cases are not ordinarily disposed of on the merits by only 2 judges.

(3) Hearing Calendar Cases — Prior to the formal publication of the court calendar, each judge on the panel is furnished with a copy of the 5th Cir. R.

28.2.1 certificate of interested persons for the judge's study to determine whether recusal or disqualification is appropriate.

(C) If a judge recuses, or is disqualified, he or she immediately notifies the other members of the panel, and arrangements are made for a substitute judge.

SPECIAL PANELS AND CASES REQUIRING SPECIAL HANDLING

Corporate Reorganization — Chapter 11.

The first appeal is handled in the usual manner. Counsel must state in their briefs whether the proceeding is likely to be complex and protracted so that the panel can determine whether it should enter an order directing that it will be the permanent panel for subsequent appeals in the same matter. If there are likely to be successive appeals, a single panel may thus become fully familiar with the case thus making the handling of future appeals more expeditious and economical for litigants, counsel and the court. (For the rule regarding direct appeals in bankruptcy matters see 5th Cir. R. 47.4).

Criminal Justice Act Plan. The court has adopted a plan and guidelines under the Criminal Justice Act. Copies are available from the clerk.

Certified Records for Supreme Court of the United States. The clerk's office does not prepare a certified record unless counsel specifically requests it or the Clerk of the United States Supreme Court so directs. (See generally Sup. Ct. R. 12.7, 16.2, and 19.4).

Building Security.

(A) Reasons for Building Security — These rules are to minimize interference with and disruptions of the court's business, to preserve decorum in conducting the court's business and to provide effective security in the John Minor Wisdom United States Court of Appeals Building and garage located at 600 Camp Street, New Orleans, Louisiana. These entire premises are called The Building.

(B) Security Personnel — The term "Security Personnel" means the U.S. Marshal or Deputy Marshal, Court Security Officer, or a member of the Federal Protective Service Police.

(C) Carrying of Parcels, Bags, and Other Objects — Security Personnel shall inspect all objects carried by persons entering The Building. No one shall enter or remain in The Building without submitting to an inspection.

(D) Search of Persons — Security personnel may search any person entering The Building or any space in it. Anyone who refuses a search must be denied entry.

(E) Unseemly Conduct — No person shall:

(1) Loiter, sleep or conduct oneself in an unseemly or disorderly manner in The Building;

(2) Interfere with or disturb the conduct of the court's business in any manner;

(3) Eat or drink in the halls of The Building or in any courtrooms except at court approved social functions;

(4) Block any entrance to or exit from The Building or interfere in any person's entry into or exit from The Building.

(F) Entering and Leaving — All persons must enter and leave courtrooms only through such doorways and at such times as are designated by the Security Personnel.

(G) Spectators — The entrance and departure of spectators to or from courtrooms is subject to the presiding judge's directions. The U. S. Marshal may designate spectator seating in any courtroom. Spectators excluded because of lack of seating and spectators leaving the courtroom while court is in session or any recess shall not loiter or remain in the area adjacent to the courtroom.

(H) Cameras and Electronic Equipment — No person shall introduce or attempt to introduce any type of camera, recording equipment, or other type of electrical or electronic device into The Building without the court's permission.

(I) Weapons — Except for Security Personnel, no person shall be admitted to or allowed to remain in The Building with any object that might be employed as a weapon unless authorized in writing by the court to do so.

(J) Enforcement — Security Personnel shall enforce these security provisions and any other provisions the court might implement. Attorneys and parties who violate these provisions are subject to, inter alia, contempt proceedings and sanctions.

APPENDIX OF FORMS.

Form 1. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court.

United States District Court for the
_____ District of _____
File Number _____

A.B., Plaintiff)
)
v.)
) Notice of Appeal
)
C.D., Defendant)

Notice is hereby given that (here name all parties taking the appeal), (plaintiffs) (defendants) in the above named case, * hereby appeal to the United States Court of Appeals for the _____ Circuit (from the final judgment) (from an order (describing it)) entered in this action on the _____ day of _____, 20 ____.

(s) _____
Attorney for _____
Address: _____

* See Rule 3(c) for permissible ways of identifying appellants. (As amended Apr. 22, 1993, eff. Dec. 1, 1993; Mar. 27, 2003, eff. Dec. 1, 2003.)

Form 2. Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court.

UNITED STATES TAX COURT
Washington, D.C.

A.B., Petitioner)
)
v.) Docket No. _____
)
Commissioner of Internal)
Revenue, Respondent)

Notice of Appeal

Notice is hereby given that (here name all parties taking the appeal)* hereby appeal to the United States Court of Appeals for the _____ Circuit from (that part of) the decision of this court entered in the above captioned proceeding on the _____ day of _____, 20 ____ (relating to _____).

(s) _____
Counsel for _____
Address: _____

* See Rule 3(c) for permissible ways of identifying appellants. (As amended Apr. 22, 1993, eff. Dec. 1, 1993; Mar. 27, 2003, eff. Dec. 1, 2003.)

Form 3. Petition for Review of Order of an Agency, Board, Commission or Officer.

United States Court of Appeals
for the _____ Circuit

A.B., Petitioner	)
	)
v.	) Petition for Review
XYZ Commission,	)
Respondent	)

(here name all parties bringing the petition) * hereby petition the court for review of the Order of the XYZ Commission (describe the order) entered on _____, 20 ____.

(s) _____
Attorney for Petitioners
Address: _____

* See Rule 15. (As amended Apr. 22, 1993, eff. Dec. 1, 1993; Mar. 27, 2003, eff. Dec. 1, 2003.)

Form 4. Affidavit Accompanying Motion for Permission to Appeal in Forma Pauperis.

United States District Court for the _____ District of _____

_____

v. Case No. _____

_____

Affidavit in Support of Motion

I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. 28 § U.S.C. 1746; 18 U.S.C § 1621.) or

Instructions

Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write in that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.

Signed: _____ Date: _____

My issues on appeal are:

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ ____	$ ____	$ ____	$ ____
Self-employment	$ ____	$ ____	$ ____	$ ____
Income from real property (such as rental income)	$ ____	$ ____	$ ____	$ ____
Interest and dividends	$ ____	$ ____	$ ____	$ ____
Gifts	$ ____	$ ____	$ ____	$ ____
Alimony	$ ____	$ ____	$ ____	$ ____
Child support	$ ____	$ ____	$ ____	$ ____
Retirement (such as social security, pensions, annuities, insurance)	$ ____	$ ____	$ ____	$ ____
Disability (such as social security, insurance payments)	$ ____	$ ____	$ ____	$ ____
Unemployment payments	$ ____	$ ____	$ ____	$ ____
Public-assistance (such as welfare)	$ ____	$ ____	$ ____	$ ____
Other (specify): ____	$ ____	$ ____	$ ____	$ ____
Total monthly income	$ ____	$ ____	$ ____	$ ____

2. List your employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of employment	Gross monthly pay
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of employment	Gross monthly pay
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

4. How much cash do you and your spouse have? $ _____
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
_____	_____	$_____	$_____
_____	_____	$_____	$_____
_____	_____	$_____	$_____

If you are a prisoner, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Home (Value)	Other real estate (Value)	Motor Vehicle #1 (Value)
_____	_____	Make & year: _____
_____	_____	Model: _____
_____	_____	Registration #: _____
Motor Vehicle #2 (Value)	Other assets (Value)	Other assets (Value)
Make & year: _____	_____	_____
Model: _____	_____	_____
Registration #: _____	_____	_____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
_____	_____	_____
_____	_____	_____
_____	_____	_____

7. State the persons who rely on you or your spouse for support.

Name (or, if under 18, inititals only)	Relationship	Age
_____	_____	_____
_____	_____	_____
_____	_____	_____

8. Estimate the average monthly expenses you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.

	You	Your Spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real-estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ _____	$ _____

	You	Your Spouse
Utilities (electricity, heating fuel, water, sewer, and Telephone)	$ _____	$ _____
Home maintenance (repairs and upkeep)	$ _____	$ _____
Food	$ _____	$ _____
Clothing	$ _____	$ _____
Laundry and dry-cleaning	$ _____	$ _____
Medical and dental expenses	$ _____	$ _____
Transportation (not including motor vehicle payments)	$ _____	$ _____
Recreation, entertainment, newspapers, magazines, etc.	$ _____	$ _____
Insurance (not deducted from wages or included in Mortgage payments)	$ _____	$ _____
Homeowner's or renter's	$ _____	$ _____
Life	$ _____	$ _____
Health	$ _____	$ _____
Motor vehicle	$ _____	$ _____
Other: _____	$ _____	$ _____
Taxes (not deducted from wages or included in Mortgage payments) (specifiy): _____	$ _____	$ _____
Installment payments	$ _____	$ _____
Motor Vehicle	$ _____	$ _____
Credit card (name): _____	$ _____	$ _____
Department store (name): _____	$ _____	$ _____
Other: _____	$ _____	$ _____
Alimony, maintenance, and support paid to others	$ _____	$ _____
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ _____	$ _____
Other (specify): _____	$ _____	$ _____
Total monthly expenses:	$ _____	$ _____

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☐ No If yes, describe on an attached sheet.

10. Have you spent -or will you be spending-any money for expenses or attorney fees in connection with this lawsuit? ☐ Yes ☐ No

If yes, how much $ _____

11. Provide any other information that will help explain why you cannot pay the docket fees for your appeal.

_____

_____

_____

12. State the [city and state] of your legal residence.

_____

_____

Your daytime phone number: (____) _____

Your age: _____ Your years of schooling: _____
[Last four digits of] your social-security number: _____
(As amended Apr. 24, 1998, eff. Dec. 1, 1998; amended effective December 1, 2010; amended effective December 1, 2013)

Form 5. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court or a Bankruptcy Appellate Panel.

United States District Court for the
_____ District of _____

In re	)	
_____,	)	
Debtor	)	
	)	
_____,	)	
Plaintiff	)	File No. _____
	)	
v.	)	
	)	
_____,	)	
Defendant	)	

Notice of Appeal to
United States Court of Appeals
for the _____ Circuit

_____, the plaintiff [or defendant or other party] appeals to the United States Court of Appeals for the _____ Circuit from the final judgment [or order or decree] of the district court for the district of _____ [or bankruptcy appellate panel of the _____ circuit], entered in this case on _____, 20 ____ [here describe the judgment, order, or decree] _____.

The parties to the judgment [or order or decree] appealed from and the names and addresses of their respective attorneys are as follows:

Dated

_____

Signed

_____

Attorney for Appellant
Address:

_____

_____

(As added Apr. 25, 1989, eff. Dec. 1, 1989; amended Mar. 27, 2003, eff. Dec. 1, 2003.)

Form 6. Certificate of Compliance with Rule 32(a).

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Reguirements.

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☐ this brief contains [state the number of] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

☐ this brief uses a monospaced typeface and contains [state the number of] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

☐ this brief has been prepared in a proportionally spaced typeface using [state name and version of word processing program] in [state font size and name of type style], or

☐ this brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

(s) _____

Attorney for _____

Dated: _____

(As added Apr. 29, 2002, eff. Dec. 1, 2002.)

Form 7. Fifth Circuit Court of Appeals Form for Record References as directed by the Clerk of Court.

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Reguirements.

For multiple record cases, parties will cite "ROA" followed by a period, followed by the Fifth Circuit appellate case number of the record they reference, followed by a period, followed by the page of the record. For example, "ROA.13-12345.123."

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: (Effective December 1, 2013.)

UNIFORM LOCAL CIVIL RULES OF THE UNITED STATES DISTRICT COURTS FOR THE NORTHERN AND THE SOUTHERN DISTRICTS OF MISSISSIPPI

Rule 26. Discovery control.

JUDICIAL DECISIONS

Sanctions.

Primary effects of the defendant's failures to comply with its obligations to produce electronically-stored information (ESI) were: (1) the tremendous expense of time and other resources that they have occasioned; and (2) the potential threat to the judicial process posed by such casual disregard for discovery obligations; the defendant's gross negligence in preserving and producing ESI, combined with its legal manager's suspicious and inexcusable disregard for the court's order to cooperate with the special master warranted sanctions under Fed. R. Civ. P. 37. Accordingly, the court ordered the defendant to produce the contents of the legal manager's computer, with the exception of: (1) those materials which are protected by attorney-client privilege; and (2) those materials which include discussion of potential settlement in this matter; moreover, the defendant was instructed to provide a privilege log which complied with S.D. Miss. R. 26(a)(1)(C). PIC Group, Inc. v. LandCoast Insulation, Inc., — F. Supp. 2d —, 2011 U.S. Dist. LEXIS 73342 (S.D. Miss. July 7, 2011).

Index to Uniform Local Rules of the United States District Courts for the Northern and Southern Districts of Mississippi

UNIFORM LOCAL RULES OF THE UNITED STATES BANKRUPTCY COURTS FOR THE NORTHERN AND SOUTHERN DISTRICTS OF MISSISSIPPI

Originally adopted February 1, 2010; as amended January 1, 2012

Rule 3015-1. Filing, Objection to Confirmation, and Modification of a Plan in a Chapter 12 Family Farmer's Debt Adjustment or a Chapter 13 Individual's Debt Adjustment Case.

(g) *Modification of plan after confirmation.*

(1) *Requirement for amended Schedules I and J.* If a debtor in a chapter 12 or a chapter 13 case files a request to modify a confirmed plan pursuant to sections 1229 or 1329 based in whole or in part upon a change in the amount of the debtor's income or expenses, the debtor shall file amended Schedules I and J evidencing such change in financial circumstances contemporaneously with the Notice of Modification.

(2) *Secured claims timely filed after plan confirmation.* If a proof of claim, which claims a security interest in the property of the debtor, is timely filed after confirmation of the plan, but is not provided for in the plan, the claim can only be paid through the confirmed plan following a request for modification and order, as provided for in Fed. R. Bankr. P. 3015(g). Nothing contained herein shall control the treatment of the claim in the confirmed plan. (Amended effective December 1, 2013.)

Rule 3018-1. Acceptance or Rejection of Plan in a Chapter 11 Reorganization.

(a) *Voting.* Unless provided otherwise by order of the Court, no ballots shall be filed with the Clerk of Court. The notice, which is required by Fed. R. Bankr. P. 3017(d), shall direct that all ballots be submitted to the plan proponent, or designated agent, at a specified mailing address.

(b) *Ballot Summary and Certification.* For all hearings on confirmation of a Chapter 11 plan, the plan proponent must prepare a written *Ballot Summary and Certification* in substantially the same format as prescribed by the Clerk and made available on the Court's website. At least three days prior to the

confirmation hearing, the plan proponent or its designated agent shall file with the Court the *Ballot Summary and Certification* and, unless the Court orders otherwise, attach copies of all ballots thereto. (Effective December 1, 2013.)

Rule 4001-1. Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements.

(a) *Relief from stay; prohibiting or conditioning the use, sale, or lease of property.*

(1) *Motion.*

(A) *Service.* A motion pursuant to section 362(d) and Fed. R. Bankr. P. Rule 4001(1) seeking relief from the automatic stay shall be served in the manner provided for by Fed. R. Bankr. P. Rules 9014 and 7004. Additionally, unless otherwise ordered by the court, such motion shall be served on any entity having a known lien on the subject property (excluding ad valorem taxing authorities) or that will be affected by the relief requested in the motion; on the United States Trustee; on the case trustee; on any chapter 11 creditors' committee (or its agent); on the creditors listed pursuant to Fed. R. Bankr. P. Rule 1007 (only in the absence of duly appointed creditors' committees); and on any person or entity who has filed a request for the receipt of all notices in the case or proceeding and who has served such requests on the trustee or debtor in possession.

(B) *Supporting documentation.* When a motion seeking relief from the automatic stay is filed, the moving party shall include in the motion and/or attach to the motion the following:

(i) A description of the subject property;

(ii) A complete and legible copy of movant's security agreements and security instruments which establish a valid lien encumbering the subject property;

(iii) The value of the subject property and the basis of the valuation; and,

(iv) The amount of the outstanding indebtedness secured by each lien encumbering the subject property as reflected by the schedules of the debtor(s) or such other amount as may be known by the movant.

(C) *Initial 4001-1 conference.* The attorneys for movant or any objecting parties shall confer with respect to the issues raised by the motion in advance of the hearing for the purpose of determining whether a consensual order may be entered and/or for the purpose of stipulating to relevant facts, such as the value of the property and the extent and validity of any security instrument.

(D) *Agreed order.*

(i) If the moving creditor, the debtor(s) and the trustee agree as to the relief to be granted and if relief from the automatic stay as well as abandonment is not contested, an agreed order signed by the debtor(s) or the attorney for the debtor(s), the trustee and the moving creditor shall be submitted to the court for consideration no later than 14 days after the date scheduled for hearing on the subject motion. Parties to whom the order or judgment has been submitted

shall promptly sign it or promptly contact the party who drafted it to express any objection to the form of the proposed order or judgment. The parties shall attempt to resolve any differences in the form of the order or judgment before submitting competing orders or judgments to the court.

(ii) As provided by Fed. R. Bankr. P. Rule 4001(d)(4), the court may direct that the procedures prescribed by Fed. R. Bankr. P. Rule 4001(d)(1)-(3) shall not apply and the agreement may be approved without further notice if the court determines that a motion made pursuant to Fed. R. Bankr. P. Rule 4001(a)-(c) was sufficient to afford reasonable notice of the material provisions of the agreement and an opportunity for a hearing; otherwise, notice of the proposed agreed order shall be given to the appropriate creditors and parties in interest.

(E) *Order Affecting Real Property.* Any Order affecting real property shall either incorporate the legal description of the real property in the body of the order itself, or attach a legal description of the real property as an exhibit to the order.

(3) *Waiver or Reduction of Stay of Order.* Any proposed order granting relief from the automatic stay may not waive or reduce the 14-day stay unless the motion for relief from the automatic stay specifically states the basis for the waiver or reduction, although the moving creditor, debtor(s), and the trustee may agree to waive or reduce the 14-day stay. The Court may require that a hearing be held on a request for a waiver or reduction of the 14-day stay.

(e) *Procedure Regarding Motion to Extend the Automatic Stay Pursuant to Section 362(c)(3)(B).*

(1) Any party in interest seeking a continuation of the automatic stay pursuant to 11 U.S.C. §362(c)(3)(B), shall file, in accordance with Fed. R. Bank. Pro. Rule 9013, a motion and proposed order. The movant shall state whether continuation of the automatic stay is sought with respect to all creditors or, if less than all creditors, shall specify the creditor(s) with respect to whom the continuation of the automatic stay is sought. The movant also shall set forth facts to establish that the filing of the present bankruptcy case was in good faith.

(2) For a motion to continue the automatic stay filed on or within 14 days of the date of filing the petition, the court shall set a hearing date no later than 30 days after the filing of the petition. For a motion to continue the automatic stay filed more than 14 days after the date of the filing of the petition, the court shall set a hearing date with not less than 14 days notice. The mere filing of the motion will not extend the automatic stay beyond the 30th day after the filing of the petition. If the hearing date is more than 30 days after the date of the filing of the petition, it is incumbent on the debtor or other party in interest to seek an injunction (through the filing of a complaint and motion for a Temporary Restraining Order) to stop any creditor/lienholder collection efforts which may be scheduled to occur after the 30th day following the filing of the petition, but before the hearing on the motion to continue the automatic stay.

(3) A party in interest opposing a motion for continuation of the automatic stay must file a response to the motion. The opponent shall state specifically

why the motion should not be granted or state any conditions or limitations that should be imposed upon granting a continuance of the stay.

(4) In the absence of a timely filed response, the Court may allow the motion seeking a continuance of the automatic stay without a hearing. (Amended effective December 1, 2013.)

Rule 9017-1. Exhibits.

(a) *Custody and Disposition of Exhibits.* All exhibits, including models, diagrams, or other material items, filed in a proceeding must be physically removed by the parties who filed them, in the event no appeal is perfected, within sixty days from the date of final disposition of the case by this court, or, in the event an appeal is perfected and thereafter disposed of, within thirty days after receipt of the judgment, other process, or certificate disclosing disposition of the case by that court. In the event the exhibits are not removed from the custody of the clerk within the required time, the clerk may destroy or otherwise dispose of the exhibits.

(b) *Custody of Sensitive Exhibits.* Sensitive exhibits include, but are not necessarily limited to, drugs, weapons, currency, pornography, and items of high monetary value. Sensitive exhibits offered or received in evidence will be maintained in the custody of the clerk of court during the hours in which the court is in session. At the conclusion of each daily proceeding and at the noon recess, the clerk will return all sensitive exhibits to the offering counsel or party, who must then be responsible for maintaining custody and the integrity of such exhibits until the next session of court, at which time they must be returned to the clerk, unless otherwise ordered by the court. Following the return of a verdict in a jury case, or the entry of a final order in a non-jury case, sensitive exhibits will be handled or disposed of in the same manner as other exhibits under this rule. (Effective December 1, 2013.)

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